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Supreme Court, U.S.
FILED
09-110 JUL 23 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

HCA INC., BRIDGESTONE AMERICAS, INC. F/K/A BRIDGESTONE AMERICAS HOLDINGS, INC., HUNTSMAN CORPORATION, NECHES GULF MARINE, INC., AND HORNBECK OFFSHORE SERVICES, INC.,
Petitioners,

v.

AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AND ALAN S. DANIEL AND WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to The Appellate Court of Illinois, First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985), this Court held that a state court may not apply a single State's laws to a nationwide class action, consistent with the federal Due Process and Full Faith and Credit Clauses, without first determining that the State has significant contacts with "the claims asserted by each member of the plaintiff class." In this case, the court considered the State's contacts on a class-wide basis, holding that Illinois law could apply to a nationwide class challenging secret insurance brokerage commissions because the commission scheme was orchestrated from the broker's principal headquarters in Illinois and third parties sent the commissions there. Thus, the court applied Illinois law to the claims of class members from other States who dealt only with affiliates of the broker incorporated in their States.

The questions presented are:

1) Does the Due Process Clause or Full Faith and Credit Clause, as interpreted in *Shutts*, require an individualized choice of law analysis for each class member's claim before a single State's law may be applied to a nationwide class action?

2) Does the lower court's determination that Illinois law applies to this nationwide class violate the Due Process Clause or Full Faith and Credit Clause?

RULE 14.1(b) STATEMENT

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Allied Van Lines, Inc., Aon Corporation, Aon Group, Inc., Aon Services Group, Inc., Asset Strategies, Inc., N. Albert Bacharach, Jr., Bishop and Associates, P.S.C., Bridgestone Americas, Inc., Connie Pentz Realty Co., Dale Johnson Trucking, Inc., Alan S. Daniel, Joseph C. Hawthorn, HCA Inc., W. Andrew Hoffman, Hornbeck Offshore Services, Inc., Huntsman Corporation, Gary Marcus, Neches Gulf Marine, Inc., North American Van Lines, Inc., Pritchard, McCall & Jones, LLC, Professional Asset Strategies, Inc., Rinis Travel Service, Inc., Signum LLC, and Unlimited Vacation and Cruises, and Williamson County Agricultural Association.

RULE 29.6 STATEMENT

HCA Inc. is privately held. Bridgestone Americas, Inc., formerly known as Bridgestone Americas Holdings, Inc., is a wholly owned subsidiary of Bridgestone Corporation (Japan), which is publicly traded in Japan, and Bridgestone Corporation is the ultimate parent. Huntsman Corporation is a publicly traded company (HUN), it has no parent company, and no publicly held company other than Huntsman Corporation owns 10% or more of its stock. Neches Gulf Marine, Inc. is privately held. Hornbeck Offshore Services, Inc. is a publicly traded company (HOS), it has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners HCA Inc., Bridgestone Americas, Inc., Huntsman Corporation, Neches Gulf Marine, Inc., and Hornbeck Offshore Services, Inc. respectfully petition for a writ of certiorari to review the judgment of the Appellate Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois (App. 5a-52a) is unreported. The relevant orders of the Circuit Court of Cook County, Illinois (App. 53a-126a) are unreported.

JURISDICTION

The Appellate Court of Illinois issued its opinion on June 19, 2008, and it denied rehearing on November 10, 2008. App. 4a-5a. The Supreme Court of Illinois denied the petitions for leave to appeal on March 25, 2009. App.1a-2a. Justice Stevens extended the time for filing a petition for writ of certiorari to July 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Full Faith and Credit Clause provides:

"Full Faith and Credit shall be given in each State to the public Acts . . . of every other State." U.S. CONST. art. IV, § 1.

The Due Process Clause provides:

"[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

STATEMENT

A. The parties

1. The Aon respondents and their affiliates (collectively "Aon") are the world's second largest insurance broker and the world's largest reinsurance broker, with revenues of $47 billion from 1994 to 2004. Businesses and individuals who need insurance retain Aon to help them decide which insurance companies, products, and services best fit their needs, and to negotiate the best possible prices on their behalf. In return for these services, Aon receives either a flat fee from its client or a standard commission (typically a percentage of the premiums) from the insurance company with which it places its client's business.

From 1994 to 2004, in addition to this standard compensation, Aon secretly obtained contingent commissions and other kickbacks from insurance companies in return for steering its clients' business to those companies. R3998-4003, 13805-13811. As a result, Aon's clients did not receive the services they bargained and paid for, including honest counsel and competitive pricing for their insurance coverage. These undisclosed commissions were built into the premiums paid by clients and were quite profitable for Aon, amounting to approximately $170 million—nearly one-fourth of Aon's net income—in 2003. R4003.

2. Petitioners are clients of Aon affiliates located in various States, and they objected to the terms of a nationwide class action settlement in Illinois state court involving these undisclosed commissions. HCA, a Delaware corporation headquartered in Tennessee, is the United States' leading provider of healthcare

services. It signed written contracts with an Aon affiliate in Tennessee and paid more than $600 million for insurance purchased through that affiliate from 1998 to 2005. In 2004 and 2005, HCA also contracted with Aon affiliates in the United Kingdom and Bermuda and paid over $8 million for insurance purchased through them. R3872-3934.

Bridgestone Americas, an international family of enterprises with 53 production facilities and 53,000 employees, is headquartered in Tennessee and purchased insurance through Aon affiliates in Tennessee and London. Huntsman, a global manufacturer and marketer of differentiated chemicals based in Utah, purchased directors' and officers' liability insurance through Aon affiliates in Utah and Colorado. Neches Gulf Marine, a Texas-based company providing support services to the offshore oil and gas exploration and production industry in the Gulf of Mexico, purchased insurance through an Aon affiliate in Texas. Hornbeck Offshore, which also provides offshore services, purchased insurance through Aon affiliates in Louisiana and Texas.

B. The *Daniel* class action

1. This case was filed in the Circuit Court of Cook County, Illinois on August 19, 1999. For four years, the parties focused on motion practice and conducted only very limited discovery.

The live complaint, which was filed in June 2003, named Respondents Alan Daniel (a New Jersey resident) and Williamson County Agricultural Association (an Illinois corporation) as plaintiffs, and it alleged Illinois law causes of action against Aon for breach of fiduciary duty, conspiracy to breach fiduciary duty, deceptive trade and business practices,

consumer fraud, and unjust enrichment. The complaint sought certification of a nationwide class on the fiduciary duty and conspiracy claims, and it alleged a constructive trust theory of recovery.

2. Although this case eventually settled shortly after Aon was investigated by several government entities (as explained below), Aon initially defended itself vigorously. Early in the case, Aon moved to dismiss the complaint and opposed class certification on the ground that applying Illinois law to Daniel's claims and to those of a nationwide class was prohibited by the federal Constitution as interpreted in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *E.g.*, R1075-1077, 1092, 1108, 1118-1119. Aon also pointed out substantial differences in state laws regarding breach of fiduciary duty and the availability of a constructive trust theory of recovery. *E.g.*, R1069-1075, 1088-1095.

In a November 2003 order, the trial court denied Aon's motion to dismiss the complaint as to Daniel. It reasoned that Illinois had the most significant relationship to his claims because the kickback scheme was orchestrated from Aon headquarters in Illinois, the kickbacks were received there, and the Aon affiliate with which Daniel dealt had its principal place of business in Illinois. App. 122a, 126a.

Then, in July 2004, the trial court granted plaintiffs' motion for certification of a nationwide class of all persons who employed the services of an Aon affiliate that was eligible to or did receive undisclosed commissions. Relying on its November 2003 order, the court found "that the plaintiffs' allegations are sufficient to support the ruling that Illinois law may be properly applied to both named plaintiffs' claims, and subsequently, to the class members' claims.

Therefore, this Court holds that no individual choice of law analyses will be required to be entered into by way of certifying a nationwide class in this matter." App. 114a; *see id.* at 105a (reiterating "that both Daniel's and WCAA's claims (and in following, the class' claims) shall be governed by Illinois law"). The court also noted the "obvious benefits" of "having these issues addressed and decided in a single forum at a single time." App. 100a.

The certified class presently consists of over 1.5 million Aon clients of all different sizes from all 50 States and the District of Columbia. Those clients formed relationships with Aon entities located in each State and in other countries. Some of these relationships were memorialized in written contracts, and some of the contracts contained provisions choosing the law of jurisdictions other than Illinois. *E.g.*, R3872-3934 (HCA contracts); R7448-7473 (contract selecting New Jersey law).

3. Aon moved for reconsideration of the interlocutory class certification ruling, arguing that *Shutts* required the court to conduct a 50-state conflicts of law analysis as well as to determine whether Illinois had sufficient contacts with the claims of each class member. The court largely rejected that argument in a November 2004 order reaffirming certification. The court did acknowledge that contracts between Aon affiliates and some class members might be needed to define their confidential relationship, and if so "this Court must conclude pursuant to Section 188 [of the Restatement (Second) of Conflicts of Law] that the law of all 50 states will apply to plaintiffs' claims and the Court will need to conduct an exhaustive analysis of [those laws]." App. 90a. The court put off a decision on whether such an

analysis was required because the existence and content of particular contracts was not yet known. *Ibid.*

For class members without contracts, the court reiterated that Illinois law applied and held that it "need not engage in individual conflicts of law analysis for the 50 states." App. 91a-92a. It also held that application of Illinois law was consistent with *Shutts* simply because "the pleadings in this matter clearly demonstrate that the parties were aware that they were dealing with an Aon entity from Illinois." App. 95a. Alternatively, the court reasoned that even if the laws of all 50 States applied, laws requiring individualized proof of the existence of a fiduciary duty could be "handled in subclasses" because the common and predominant question was whether any duty was breached. App. 93a-94a. If subclasses became unmanageable, the court noted that it could later set aside the class certification. App. 92a. The court did not address the other conflicts identified by Aon, such as the availability and nature of a constructive trust recovery in other states.

Aon asked the trial court to certify for interlocutory appeal the question whether this class action violated *Shutts*, and it filed an extensive brief explaining why the court's latest order "directly conflicts" with *Shutts*. R1419-1427. The trial court declined to certify the appeal.

C. The government investigation and settlement

Meanwhile, beginning in early 2004, the attorneys general and insurance regulatory agencies of New York, Connecticut, and Illinois (collectively, the "Regulatory Agencies") investigated Aon's misconduct in collecting undisclosed financial incentives for

steering business to certain insurers. In early 2005, the Regulatory Agencies filed complaints against Aon and its affiliates arising out of this conduct. A147-223.

On March 4, 2005, Aon's CEO admitted that "Aon and other insurance brokers and consultants entered into contingent commission agreements . . . that created conflicts of interest." R3982. On the same day, the Regulatory Agencies and Aon entered into a settlement that required Aon to pay $190 million into an opt-in fund for clients who retained Aon to place, renew, consult on, or service insurance from 2001 to 2004, where such placement resulted in contingent commissions or overrides. R4886, 4890.

D. The *Daniel* settlement and Petitioners' objections

1. Although the regulatory settlement covered only clients from 2001 to 2004 who opted in, the *Daniel* case provided a ready vehicle for Aon to bind other affected clients to a settlement. Aon quickly agreed to settle *Daniel* on March 9 for $38 million—exactly 20% of the Regulatory Settlement—and agreed to give half of that amount to counsel for the plaintiff class as attorneys' fees. Another $5 million was set aside to pay the settlement administrator Aon had chosen, leaving a fund of $14 million to compensate class members. R5570-5598. The unclaimed balance of the regulatory settlement, which amounted to approximately $49 million, ultimately was added to the *Daniel* settlement fund as well. R16552-16553. The settlement agreement stated that Aon still did not agree that certification was proper but did agree that the settlement was fair. R5573.

The trial court preliminarily approved the settlement. In so doing, it broadened and clarified the class definition to include all affected Aon clients from 1994 to 2004, regardless of whether contingent commissions were disclosed to them. R2276-2277.

2. Approximately 50 parties objected to the settlement, including the Attorney General of Florida and sophisticated business entities. Among other objections, Petitioners referred back to Aon's briefing and argued that class certification could not be maintained, or that at minimum subclasses with different settlement values were required, given the differences in state fiduciary duty and other laws and the various contracts that Aon affiliates had with certain class members. *E.g.*, R3858-3859, 3862-3864; R vol. 77, at 175-188, 244-245, 248-249; R vol. 78, at 227-229, 231-232. For example, HCA explained at the fairness hearing that its remedy for breach of fiduciary duty under Tennessee law included forfeiture of Aon's fees and thus was worth more than $24 million, much more generous than the remedy available under Illinois law (which was $178,453.79 under the *Daniel* settlement). R vol. 78, at 218-219, 224.

The trial court overruled all objections, approved the settlement as fair and reasonable, and approved $19 million in attorneys' fees for class counsel. App. 56a-57a, 79a-83a, 85a. With respect to the certification issue, the court said that it had "already noted that maintaining a nationwide class may require the creation of subclasses" and that "there has been no indication up to this point that such subclasses would in fact be unmanageable." App. 79a. The court entered final judgment on the same day, however, without resolving the subclass point. App. 53a-57a.

3. Petitioners and other objectors appealed on several grounds, including that the trial court violated *Shutts* by applying Illinois law to this nationwide class. The Illinois Appellate Court affirmed, reviewing the issue *de novo* and agreeing that Illinois law could be applied class-wide. App. 5a-52a. The court acknowledged that "[t]he injury is the result of the contractual relationship" between the parties and that "many class members entered into contracts in states other than Illinois." App. 20a. It concluded, however, that Illinois law applied because (1) the wrongful scheme was orchestrated from "Aon's center of business" in Illinois, and (2) the class's theory of recovery was to impose a constructive trust on contingent commissions "under the control of an Illinois defendant." App. 19a. The court also held that the trial court was not required to consider variations in the laws of the 50 States because the settlement was fair and class members who would have been better off under their own State's laws could have opted out. App. 22a-24a, 29a.

REASONS FOR GRANTING THE PETITION

The court below approved a nationwide settlement class involving 1.5 million plaintiffs from all over the country. It acknowledged that the varying laws of different States would otherwise apply to different class members' claims. Yet the court held that it was not required by the federal Constitution to conduct an individualized choice of law analysis as to each class member's claims. Instead, it considered the named plaintiffs' contacts with Illinois, and it held that Illinois law should apply to all class members' claims because the defendants hatched their secret scheme and received its fruits there.

The Illinois court's decision squarely conflicts with *Shutts*, which makes clear that the Due Process Clause and the Full Faith and Credit Clause require an individualized choice of law analysis for each class member's claim before a single State's law may be applied. Not only did the lower court wrongly refuse to conduct that individualized analysis, but the analysis it did perform was constitutionally defective in precisely the same ways as the Kansas court's analysis reversed in *Shutts*. For example, the court pointed to no evidence that a non-Illinois plaintiff who dealt with a non-Illinois Aon entity entirely outside of Illinois expected that claims growing out of their relationship would be decided under Illinois law. For these reasons alone, the Court should grant certiorari and set the case for briefing and oral argument, or, because the decision below is so plainly inconsistent with *Shutts*, summarily reverse.

At minimum, if *Shutts* does not straightforwardly demand reversal, there is a square conflict in the lower courts over whether a court must conduct an individualized assessment of whether a given State's law can constitutionally apply to the claims of each class member. The Third, Fifth, Eighth, and Ninth Circuits, along with the high courts of Connecticut, Maryland, and Texas, hold that such an analysis is required. In contrast, the courts below—like other courts in Illinois and courts in Oklahoma—refused to engage in such an analysis. In addition, the decisions below implicate a split of authority over whether a court may take the class nature of a lawsuit into account in deciding whether the laws of a single State can be applied to the claims of every plaintiff before it.

These questions recur frequently and are critically important, not only to fundamental principles of due process and federalism, but also to our national economy. And this challenge to a final judgment is an ideal vehicle—and a rare opportunity—for this Court to resolve these questions or, at the least, to confirm that it meant what it said in *Shutts*.

I. The Decision Below Is Directly Contrary To *Shutts*.

One of the "compelling reasons" for the exercise of this Court's certiorari jurisdiction is that a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Not all such conflicts warrant the exercise of certiorari, but this is one of the cases that calls for it. The conflict between *Shutts* and the decision below is "direct" and "readily apparent," E. Gressman et al., SUPREME COURT PRACTICE § 4.5, at 250 (9th ed. 2007), such that it is inescapable that this Court's prior ruling "rejected the position taken by the [Illinois court] below," *Spears v. United States*, 129 S.Ct. 840, 842-843 (2009) (per curiam summary reversal).

1. In *Shutts*, a nationwide class of plaintiffs brought suit in Kansas state court against an out-of-state corporation. 472 U.S. at 800-803. The Kansas courts agreed to certify the class and to apply Kansas law class-wide. *Ibid.* This Court reversed, holding that in order to apply a single State's law to a nationwide class action, that State must have sufficient connections "to the claims asserted by each member of the plaintiff class" to ensure that "the choice of [its] law is not arbitrary or unfair." *Id.* at 821-822. The Court explained that when the laws of interested States conflict, the Due Process Clause and the

Full Faith and Credit Clause prohibit a court from applying the law of one State to every claim in the case unless that State has a "significant contact or significant aggregation of contacts" to each class member's claims. *Id.* at 816-822.

In so holding, this Court expressly rejected certain of the Kansas court's rationales for applying its laws class-wide. The Court first disagreed that the unpaid royalties sought by the plaintiffs were analogous to a "common fund," such that Kansas had a special interest in applying its own law, because there was no specific identifiable res located in Kansas. *Shutts*, 472 U.S. at 819-820. Instead, the Court emphasized, the funds had been commingled with the defendant's general corporate accounts. *Ibid.*

Further, the Court explained that the class nature of the lawsuit was not a basis for relaxing the constitutional choice of law standard, flatly rejecting the "bootstrap" argument of the Kansas court that "it had much greater latitude in applying its own law to the transactions in question than might otherwise be the case" merely "by reason of the fact that it was adjudicating a nationwide class action." *Id.* at 820-821; *see also id.* at 821 (constitutional limitations on choice of law are "not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum").

The Court's decision in *Shutts* was based on the federal Due Process Clause and the Full Faith and Credit Clause, and thus it was driven by twin concerns of fairness to the parties and appropriate deference to the laws of other States. 472 U.S. at 818-

819, 822. Of special concern was "the expectation of the parties": "[t]here is no indication that when [they entered into leases] outside of Kansas, . . . the parties had any idea that Kansas law would control." *Id.* at 822. For these reasons, the Court reversed the judgment applying Kansas law to all claims of every class member. *Id.* at 823.

2. On its face, *Shutts* makes plain that the Illinois courts erred by certifying a nationwide class and giving final approval to a settlement governed exclusively by Illinois law. As Petitioners and the Aon Respondents both pointed out repeatedly to the Illinois courts, there were numerous, irreconcilable conflicts between the laws of the various States on the claims and remedies being certified. Yet the Illinois courts flaunted this Court's direction in *Shutts* regarding the analysis required when such conflicts exist.

a. Most obviously, the courts below expressly held that no choice of law analysis had to be conducted for each class member's claims. The Illinois trial court, for instance, stated flatly that "no individual choice of law analyses will be required to be entered into by way of certifying a nationwide class in this matter." App. 114a. True to its statement, the trial court focused on the claims of the two named plaintiffs, which had significant contacts with Illinois that other class members' claims lacked. App. 125a (explaining that Daniel dealt with Aon affiliate in Illinois). Then, without considering any other class members' claims, the court announced that Illinois law would apply to the entire class. App. 105a, 113a-114a. The Illinois Appellate Court agreed with the trial court's analysis and its refusal to consider other States' laws, reasoning that "[n]o rule requires a trial court to canvas the laws of all fifty states" and

that dissatisfied class members from other States "may opt-out." App. 18a-24a, 29a.

Yet this Court's principal holding in *Shutts* was that a State must have significant contacts with "the claims asserted by *each member* of the plaintiff class" in order for the choice of its law to be constitutionally valid. 472 U.S. at 821 (emphasis added). The courts below thus disregarded what *Shutts* required: an individualized analysis of each class member's claims. Moreover, *Shutts* held that an opportunity to opt out was no substitute for this analysis. *Id.* at 820.

b. Apart from the Illinois courts' refusal to conduct the individualized choice of law analysis required by *Shutts*, the analysis they did employ was constitutionally deficient for the very same reasons identified in *Shutts*. For one thing, the courts relied on allegations that the undisclosed commissions sought by plaintiffs were received in Illinois, and that any recovery would come from Illinois. This Court flatly rejected that reasoning in *Shutts*, explaining that the "common fund" concept could not be applied outside of the context where there was a specific, identifiable, non-commingled res necessarily located in the State. Here, there is no evidence that such a res exists in Illinois. That basis for the Illinois courts' analysis cannot be squared with *Shutts*.

c. Furthermore, the Illinois courts flaunted the rationales driving this Court's *Shutts* decision: the expectations of the parties, their due process rights, and the full faith and credit interests of other States. The Illinois courts applied Illinois law to claims by non-Illinois plaintiffs who dealt with non-Illinois Aon entities entirely outside of Illinois. There is no evidence that, when class members located outside of Illinois used Aon entities incorporated in their home

States to procure insurance, they had any idea that Illinois law could apply to their transaction. That is particularly true because any breach of fiduciary duty necessarily happened in each State where a plaintiff purchased insurance from its fiduciary without being told of the kickbacks. Indeed, most of the plaintiff class never dealt with the Aon parent company's headquarters or anyone else in Illinois.

In these circumstances, it is fundamentally unfair and arbitrary to apply Illinois law to all class members, at least without applying some individualized choice of law scrutiny. Applying Illinois law would also fail to give effect to the laws and interests of the States where the fiduciary relationship was created and breached. In sum, the policies identified in *Shutts* are aimed precisely at avoiding a case such as this, and the Illinois courts failed to give them effect.

d. In addition, the Illinois courts relied on the type of "bootstrapping" argument rejected by this Court in *Shutts* and other cases. *Shutts* made clear that whether a case arises in the context of a class action has no bearing on the constitutional analysis required. 472 U.S. at 820-821. In the same vein, this Court has recognized that a class action is merely a procedural device and cannot be used in a manner that alters the parties' substantive rights as individual litigants. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-613 (1997).

In this case, however, the Illinois courts relaxed the choice of law analysis due to the class nature of the lawsuit. The trial court emphasized that "the disposition of a nationwide class action in a single forum has advantages for [Aon]," since it would allow Aon to "hav[e] these issues addressed and decided in

a single forum and at a single time, rather than the forums of fifty (50) States or by the way of filing thousands of individual cases." App. 100a. In addition, the trial court acknowledged that "the law of the fifty (50) states would apply" under "a more traditional tort class action analysis," but it applied Illinois law based on the constructive trust theory of recovery that was selected to facilitate certification. App. 115a. Finally, as described above, both courts failed to conduct a choice of law analysis with respect to each class member's claims in the same way that would have been required if each member had brought the action as an individual plaintiff. The courts below erred by modifying their choice of law analysis in these ways.

3. It is not just Petitioners that believe the Illinois courts' analysis is flatly contrary to *Shutts* in these respects. The Aon Respondents repeatedly made these same arguments to the trial court in opposing certification. Specifically, Aon argued that *Shutts* requires sufficient contacts between Illinois and "each and every" class member's claims; that Illinois law cannot apply to this nationwide class action under a proper *Shutts* analysis; and that the trial court violated *Shutts* by relying on "common fund" reasoning, engaging in "bootstrapping," and ignoring the expectations of the parties. *E.g.*, R1077, 1092, 1108, 1118-1119, 1419-1427. Yet the Illinois courts still never engaged in a proper *Shutts* analysis of the connection between Illinois and each class member's claims. This is the rare case, then, in which both Petitioners and the Aon Respondents

have consistently maintained that the lower court failed to apply this Court's precedent.[1]

* * *

For these reasons, the decision below is directly contrary to *Shutts*. Not only is it wrong, but it involves an issue of far-reaching importance and is part of an ongoing trend that threatens to strip *Shutts* of any meaningful effect. *See infra*, Part III. This Court should make clear that it meant what it said in *Shutts*: state courts may not gratuitously apply their own laws to nationwide class actions without ensuring that federal constitutional requirements are satisfied. And this case offers a unique opportunity for the Court to address this issue be-

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[1] The courts below also violated *Shutts* in a second, independent way: they failed to decide whether there were conflicts in the laws of the various States before certifying a nationwide settlement class under Illinois law and approving a final settlement. *See Shutts*, 472 U.S. at 816-818 (courts must determine whether forum's law conflicts "in any material way with any other law which could apply," including those advanced by the party in the case). At an interlocutory stage of this case, in response to Aon's arguments on reconsideration of class certification, the Illinois trial court did preliminarily consider this issue. App. 88a-94a. But it never addressed all of the conflicts raised by Aon, and it never resolved the issue because it simply acknowledged that there might be conflicts and that it would need to create subclasses or decertify the class if any conflicts were real, leaving final determination of that question for a later date. App. 90a, 92a-93a. Even in finally approving the settlement, the trial court suggested that subclasses with different settlement values might be proper to accommodate conflicts, but it never created such subclasses. App. 79a. Regardless, the court's preliminary discussion of possible conflicts occurred well before the class definition was expanded and Petitioners joined the case, pointing out numerous additional conflicts that the trial court never addressed.

cause, unlike past petitions raising the issue, there is no question regarding jurisdiction here. *See infra*, Part IV. The Court should grant certiorari and either summarily reverse the decision below or set the case for briefing and oral argument.

II. At Minimum, There Is A Conflict Among Federal Appellate Courts And State Courts Of Last Resort Over What *Shutts* Requires.

To the extent the court below did not violate the plain dictates of *Shutts*, at minimum, its ruling joins a sharp conflict among the lower courts over how to implement *Shutts*' principal holding: that the federal Constitution requires a significant connection between a State and the claims of each class member for that State's law to apply. In addition, the Illinois court's decision is inconsistent with several federal and state appellate decisions holding that a court may not take the class nature of the lawsuit into consideration in determining whether a single State's law may be applied to a nationwide class. Both conflicts warrant this Court's review.

A. Lower courts disagree over whether the Constitution requires a court to conduct an individualized choice of law analysis for each class member's claims in a nationwide class action.

Notwithstanding *Shutts*' requirement that Illinois have a "significant aggregation of contacts to the claims asserted by each member of the plaintiff class," 472 U.S. at 821-822, the Illinois trial court held that "no individual choice of law analyses" were needed to certify this nationwide class, and the appellate court agreed. App. 114a. Instead, those courts focused on the two named plaintiffs and then applied

Illinois law to the entire class in blanket fashion, observing that the scheme was orchestrated from Aon's principal headquarters in Illinois and the undisclosed commissions were received there. App. 19a-20a, 114a, 122a-126a.

The Oklahoma Supreme Court also follows this class-wide approach. In its view, a defendant's principal place of business is "where conduct relevant to all class members occurred," and applying the law of that State to a nationwide consumer class action is consistent with *Shutts*. *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 626 (Okla. 2003).

The Illinois and Oklahoma courts' narrow reading of the constitutional constraints on choice of law directly conflicts with decisions of the Eighth Circuit and the Connecticut Supreme Court. In addition, the class-wide approach used in Illinois and Oklahoma is inconsistent with decisions of the Third, Fifth, and Ninth Circuits, as well as decisions of the highest courts of Maryland and Texas. Those courts have properly held that *Shutts* requires an individualized choice of law analysis for each class member's claims. This Court's review is necessary to resolve the conflict.

1. In *In re St. Jude Medical, Inc.*, 425 F.3d 1116 (8th Cir. 2005), the Eighth Circuit held that a cursory choice of law analysis strikingly similar to the one employed by the Illinois courts in this case was insufficient to comply with *Shutts*. The district court had certified a nationwide consumer class under Minnesota law because (1) the defendant was headquartered in Minnesota; and (2) much of the conduct relevant to the claims occurred in or emanated from Minnesota, where the defective product was produced. *Id.* at 1119.

The Eighth Circuit reversed, holding that "class certification was in error because the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying Minnesota law." *Id.* at 1120. In particular, "the [district] court did not analyze the contacts between Minnesota and each plaintiff class member's claims"—an inquiry necessary for the "protection of out-of-state parties' constitutional rights." *Ibid.* The court remanded for the "individualized choice-of-law analysis" required by *Shutts*, observing that there was no indication that out-of-state parties had any idea that Minnesota law could control potential claims when they received the product. *Id.* at 1120-1121.

Federal appellate courts around the country agree that *Shutts* requires courts to "apply an individualized choice of law analysis to each plaintiff's claims." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In *Georgine*, despite arguably compelling policy reasons for certification of a nationwide settlement class to resolve claims of asbestos exposure, the Third Circuit held that a wide range of factual and legal issues raised by various class members' individual claims would have to be decided under the differing laws of many States, defeating the predominance requirement for certification. In *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1187-1188 (9th Cir. 2001), the Ninth Circuit rejected the plaintiffs' argument that Colorado law should apply to a nationwide consumer class because the defendant's headquarters and manufacturing operations were there, agreeing with the district court that plaintiffs had not offered an individualized choice of law analysis

supporting the application of Colorado law to each claim. And in *Spence v. Glock, Ges. m.b.H.*, 227 F.3d 308, 311-313 & n.5 (5th Cir. 2000), the Fifth Circuit reversed the district court's conclusion that Georgia law applied because one defendant had its principal place of business there and the products in question were assembled and distributed from there, holding that the court failed to consider that individual class members lived and bought the products in every State.[2]

2. Many state high courts have also recognized that an individualized choice of law analysis is required for each class member's claims. Indeed, the Connecticut Supreme Court reversed a class certification on quite similar facts in *Macomber v. Travelers Property & Casualty Corp.*, 894 A.2d 240 (Conn. 2006). There, the complaint alleged that Travelers received undisclosed rebates when it purchased annuities that it used to create structured settlements for the plaintiff class. *Id.* at 246. The trial court certified the class and ruled that Connecticut law would apply because Travelers' home office was in Connecticut and the challenged company policies were set there. *Id.* at 257-258. The supreme court reversed

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[2] *See also O'Bryan v. Holy See*, 556 F.3d 361, 381 n.8 (6th Cir. 2009) ("Under [*Shutts*], due process requirements apply to nationwide class action lawsuits, requiring courts to engage in individualized choice of law analysis for each plaintiff's claims and not just named plaintiffs."); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.3d 718, 725 & n.6 (11th Cir. 1987) (reasoning that under *Shutts*, "the law of [a particular State] could be applied consistent with due process only if the particular transaction had some significant relation to [that State]," and agreeing with district court's holding that state-law claims regarding securities "require application of the standards of liability of the state in which each purchase was transacted").

and remanded, holding that the trial court failed to "'apply an individualized choice of law analysis to each plaintiff's claims.'" *Id.* at 256 (quoting *Georgine*, 83 F.3d at 627). It reasoned that such an analysis was required because—as in this case—"the nationally dispersed potential class members entered their structured settlements in different jurisdictions throughout the nation," and the representations in question "necessarily were made to them by the . . . agents of the defendants in those various jurisdictions." *Id.* at 257.

The highest court of Maryland has likewise held that courts must "engage in individualized [choice of law] assessments for each class member." *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 232 (Md. 2000) (citing *Shutts*, 472 U.S. at 823; *Georgine*, 83 F.3d at 627). It held that the lower court erred in applying Maryland law to all class members "in blanket fashion" without any "individualized inquiry." *Ibid.* Although the class was limited to smokers currently residing in Maryland, the court reasoned that some class members may have first suffered harm years earlier in other States, requiring application of those States' laws. *Id.* at 232-33.

Finally, Texas courts have taken a similar approach. In *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), the Texas Supreme Court recognized that "[t]he Due Process Clause limits the extent to which one state's law can be applied to claims that arise in many states." *Id.* at 680 (citing *Shutts*, 472 U.S. at 821-822). It held that the trial court erred in using the defendant's Texas headquarters to justify the application of Texas law to a nationwide consumer class action, observing that it would be "a novelty" to apply the law of a defendant's

domicile to all consumer complaints. *Id.* at 681 (quoting *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002)). Instead, it conducted a more individualized analysis, concluding that plaintiffs had failed to demonstrate that Texas law would apply to the claims of class members who purchased and used the product in other States. *Ibid.*[3]

* * *

As these cases show, there is a well-developed conflict over whether the federal Constitution as interpreted in *Shutts* requires an individualized choice of law analysis. Moreover, this conflict is outcome determinative: an appellate court in any of the jurisdictions discussed above would reverse the Illinois trial court's application of Illinois law to a nationwide class because it failed to conduct an individualized analysis of Illinois' contacts with each class member's claims. If the Court concludes that *Shutts* does not straightforwardly forbid the Illinois court's analysis, it should grant certiorari to resolve this conflict.

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[3] *See also Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 695-697 (Tex. 2003) (rejecting class-wide application of Texas law and requiring more individualized choice of law analysis for class members who did not agree to Texas choice of law clause); *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 352 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding that choice of law "analysis must be conducted on an individual basis; a nationwide class is not entitled to a 'looser' analysis merely because applying one state's law would be easier than applying many" (citing *Shutts*, 472 U.S. at 821-822)).

B. Lower courts also disagree over whether a court can take into account the class nature of a lawsuit in determining whether the laws of a single State can be applied to each class member's claims.

As discussed in Part I, *Shutts* and *Amchem* make clear that constitutional limitations on choice of law are not altered merely because an individual's claim is brought in the procedural context of a class action. Relying on *Amchem*, the Seventh Circuit has held that a court's choice of law analysis in a nationwide class action must be identical to the one it would conduct if each class member had instituted the action individually. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002). There, the Seventh Circuit rejected the trial court's attempt to alter Indiana's choice of law rules to facilitate its adjudication of a nationwide class action. Highlighting the trial court's departure from traditional choice of law principles in order to make the class suitable for certification, the Seventh Circuit made clear that, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *Id.* at 1018-1021 (citing *Amchem*, 521 U.S. at 613).

Similarly, the Second Circuit has advised courts that "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992). And the Supreme Court of Texas has made plain that "[t]he class action is a procedural device

intended to advance judicial economy" that may not be used to alter substantive rights because, "[a]lthough a goal of our system is to resolve lawsuits with 'great expedition and dispatch and at the least expense,' the supreme objective of the courts is 'to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.'" *Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000); *see also Henry Schein, Inc.*, 102 S.W.3d at 693. As a commentator recently observed, *Shutts* "effectively says that the class-wide nature of the case has no freestanding capacity to alter preexisting rights. . . . [C]hoice of law in the absence of bootstrapping results in the same choice being made for the purposes of a class action as would be made in an individual action brought in the forum state." Richard A. Nagareda, *Bootstrapping In Choice Of Law After The Class Action Fairness Act*, 74 UKMC L. REV. 661, 665 (2006).

Contrary to the Seventh Circuit's holding, the Illinois court below and the courts of Oklahoma have altered their choice of law analyses to facilitate the adjudication of nationwide classes with individual claims emanating from all across the country. As explained in Part I, the Illinois courts below relaxed the constitutional choice of law analysis based on the plaintiff's membership in a nationwide class—contrary to a holding of the federal appellate court that covers Illinois. The Supreme Court of Oklahoma has explicitly performed a similar exercise in bootstrapping, holding that Michigan law should apply to each class member's claims because "Michigan is the only state where conduct relevant to all class members occurred." *Ysbrand*, 81 P.3d at 626. The court reasoned that a single State's law should apply to each class member's claims because the "needs of the

interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions." *Ibid.*

This Court's review is necessary to resolve this conflict over whether the federal Constitution, and this Court's decisions in *Shutts* and *Amchem*, forbid a court from altering its traditional choice of law analysis when adjudicating a nationwide class.

III. These Questions Are Important And Recur Frequently, And State Courts Conducting Nationwide Class Certification Proceedings Need This Court's Direction.

A. Class action litigation has increased dramatically, especially in "magnet" state courts that subvert constitutional choice of law requirements to facilitate class certification.

Class action litigation against U.S. companies has exploded over the past few decades. One study showed that class action filings increased between 300% and 1,000% per year from 1994 to 1997. *See* 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at x (May 1, 1997). State courts have been the preferred forum for class action plaintiffs, most likely because some States persist in misapplying this Court's opinion in *Shutts*. Indeed, a recent study found that between 1988 and 1998, class actions in state court increased by 1,315%, while those in federal court increased by only 340%. *Class Action Litigation: A Federalist Society Survey, Part III*, CLASS ACTION WATCH, at 3 (Fall 1999). Given these dramatic

trends, there is a glaring need for this Court's direction to state courts about the proper constitutional standards for choice of law.

Moreover, the preference shown by class action plaintiffs (and their lawyers) is not just for any state courts, but for particular ones. A small subset of state courts routinely apply the law of a single State to all of the claims in a multi-state class action to facilitate certification, a practice that flies in the face of *Shutts*' requirement of an individualized choice of law analysis for every class member. Oklahoma and, notably, Illinois are known for taking that approach. Both States have been recognized as refusing to undertake an individualized choice of law analysis, instead applying the substantive law of a single State to every claim in a class action. *See, e.g., Ysbrand*, 81 P.3d at 625-626; *Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 846-847 (Ill. 1987).

As a result, Oklahoma and Illinois have become class action magnets: forums that lawyers flock to for the sole purpose of avoiding the constitutional choice of law requirements announced by this Court. Illinois, in particular, has developed a reputation for being a class action magnet forum, and even the Illinois Appellate Court has recognized that "50-state class actions are not uncommon in Illinois." *P.J.'s Concrete Pumping Serv., Inc. v. Nextel W. Corp.*, 803 N.E.2d 1020, 1030 (Ill. App. Ct. 2004). In fact, Madison County, Illinois was recently ranked third nationwide in annual class action filings, a ranking disproportionate to its small population. *See* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 159 (2001). Moreover, approximately 81% of the putative class actions filed in

Madison County between February 1998 and March 2001 sought to certify *nationwide* class actions. *Id.* at 169.

The problem of class action magnet forums is therefore real. And the Class Action Fairness Act of 2005 (CAFA) offers no solution to that problem. Most importantly, CAFA does not cover all class actions: it allows removal to federal court of only a defined subset of class actions, and it does not apply to the many class actions filed before its enactment. 28 U.S.C. § 1332(d)(3), (d)(4) (2006); Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 9, 119 Stat. 4 (2005). For the class actions that CAFA does cover, moreover, the availability of removal does nothing to curb the distortion of state choice of law principles in class action magnet forums because federal courts sitting in diversity are required to apply those principles. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

B. Class action magnet forums undermine due process rights, violate the Full Faith and Credit Clause, and make for bad policy.

The costs of class action magnet forums are significant. By refusing to protect the due process rights of defendants through individualized choice of law analysis, these state courts increase the uncertainty faced by potential defendants. With magnet States arbitrarily applying the law of a single State to all the claims in a class action, businesses have no hope of structuring their conduct to avoid litigation.

Here, for instance, a Delaware corporation headquartered in Tennessee (HCA) dealt with an Aon entity incorporated in Tennessee. There is no evidence

that either HCA or the Aon entity could have expected that an Illinois court would later reach out and apply Illinois law to that Tennessee-based fiduciary relationship. One of the natural consequences of a federal system of fifty States is that the laws of various States will sometimes conflict. An unpredictable method of selecting which of the conflicting laws will apply to class action claims is a recipe for arbitrary liability, which provides no due process to potential litigants.

In addition to undermining due process rights, class action magnet forums cast aside respect for State sovereignty by failing to extend full faith and credit to the laws of sister States. For instance, the Illinois court refused to apply Tennessee laws more favorable to HCA and, in doing so, failed to give effect to the public policy of Tennessee embodied in those laws. A State violates the Full Faith and Credit Clause when its choice of law "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring in judgment). "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a question to clear the queue in court." *In re Bridgestone/Firestone*, 288 F.3d at 1020.

Furthermore, as a policy matter, the existence of class action magnet forums harms both the magnet States and the nation as a whole. Most obviously, businesses do not want to locate their principal place of business in magnet States, given that it would facilitate class actions against it in that State. But the larger cost is to the nation as a whole because busi-

nesses will continue to avoid establishing their principal locations in magnet States that might otherwise be the most economically efficient choice, resulting in loss of business to those States and increased costs to businesses. Magnet States thus create economic inefficiencies in the already struggling national free enterprise marketplace.

For all of these reasons—harm to due process, federalism, and economic policy—state courts in magnet forums should not be allowed to continue refusing to follow *Shutts*. Though few in number, class action magnet forums exercise disproportionate power. As Judge Easterbrook has explained, even if as few as 10% of judges begin to certify class actions based on the spurious standards espoused by class action magnet forums, these 10% will drown out the rulings of the 90% of judges following the constitutional standards. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-767 (7th Cir. 2003); *see also* Nagareda, *supra*, 74 UMKC L. REV. at 670 ("From the standpoint of defendants that market goods or services across the country, it matters little that forty-nine states might be disinclined to certify a nationwide consumer class against them if one anomalous state would be prepared to do so.").

This Court's intervention is needed to rein in the States that have become class action magnet forums, and to ensure that the constitutional limitations on choice of law are respected throughout the country.

IV. This Case Offers An Ideal Vehicle—And A Rare, Important Opportunity—For Resolving The Questions Presented.

Whether the Court grants briefing and argument or simply reaffirms that *Shutts* means what it says,

this case provides a unique chance to address the questions presented. As explained below, this is the rare case in which this Court has jurisdiction to review a state court's refusal to follow *Shutts*, or to resolve the confusion over what *Shutts* means. Further, the case has enormous practical significance, thus warranting review.

First, while claims similar to Petitioners' have been raised to this Court numerous times in the past, this is the unusual case in which there are no jurisdictional obstacles to review. In the cases located by Petitioners that properly raise this issue, the petition for certiorari concerned an *interlocutory* class-certification ruling by a state court, where there were further proceedings (such as a trial) left to occur.[4] In that context, there were serious questions about the Court's jurisdiction to address this important and recurring issue because this Court may review only *final* judgments of state courts. *See* 28 U.S.C. § 1257(a).

Here, in contrast, the decision below is final. The Illinois courts decided that the settlement class could be certified consistent with federal constitutional principles and entered final judgment, thus dispos-

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[4] *See, e.g.*, *Gen. Motors Corp. v. Bryant*, No. 08-349 (pet. filed Sept. 15, 2008); *Sprint Spectrum L.P. v. Hall*, No. 07-1358 (pet. filed Apr. 28, 2008); *Compaq Computer Corp. v. Grider*, No. 07-95 (pet. filed July 25, 2007); *Gen. Motors Corp. v. Ford*, No. 05-39 (pet. filed July 1, 2005); *AT&T Corp. v. Allen*, No. 03-1046 (pet. filed Jan. 20, 2004); *DaimlerChrysler Corp. v. Ysbrand*, No. 03-1342 (pet. filed Mar. 19, 2004); *Mobil Corp. v. Adkins*, No. 02-132 (pet. filed July 24, 2002); *AMOCO Prod. Co. v. Lobo Exploration Co.*, No. 99-1502 (pet. filed Mar. 9, 2000); *State Farm Mut. Auto. Insur. Co. v. Speroni*, No. 97-2063 (pet. filed June 22, 1998).

ing of the entire case. App. 53a-86a. There is, in short, nothing left to be done. Like *Shutts* itself, this case presents a final judgment, offering the Court an opportunity to address the state courts' refusals to honor *Shutts*.

The rarity of a final judgment on such a class certification issue cannot be overstated. Given the realities of our litigation system today, defendants who face enormous potential exposure when a nationwide class action is certified will quickly settle, and final judgments will rarely arise. As the Fifth Circuit has explained:

> [C]ertification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damages awards.

Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted). The settlement pressure in such a case has led to dramatic, noticeable results: "the vast majority of certified class actions settle." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291 (2002); *see also* Br. of Chamber of Commerce of the U.S. and Alliance of Auto. Mfrs. as Amici Curiae in Support of Pet'r at 17-20, *DaimlerChrysler Corp. v. Ysbrand*, 124 S.Ct. 2907 (2004) (No. 03-1342), 2004 WL 1174634 (collecting other materials showing the unlikelihood of final judgments presenting *Shutts* issues, as this case does).

In addition, these issues were properly preserved in the Illinois courts. This Court cannot consider a federal claim if it was not addressed by, or properly presented to, the state court below. *Adams v. Robertson*, 520 U.S. 83, 88 (1997). In some of the petitions filed in this Court raising these issues, there were questions regarding whether the *Shutts* claim had been pressed or passed upon below. *See, e.g.*, *Gen. Motors Corp. v. Bryant*, No. 08-349 (pet. filed Sept. 15, 2008); *Gen. Motors Corp. v. Ford*, No. 05-39 (pet. filed July 1, 2005).

Here, however, there can be no question about preservation: the *Shutts* argument was squarely pressed and passed upon in the Illinois Appellate Court; it was squarely pressed in Petitioners' motions for leave to appeal to the Illinois Supreme Court (which denied review without explanation); and there are no independent state-law grounds supporting the judgments below. This is, in sum, an ideal vehicle for addressing these important issues.

Finally, the practical significance of this case makes it especially worthy of review. The severity and widespread nature of the misconduct by Aon and its affiliates, which affected at least 1.5 million of its customers nationwide, is remarkable. Yet after paying nearly $190 million to resolve the separate regulatory investigations, Aon has almost succeeded in using a pre-existing lawsuit to reach a contrived, attorney-driven private settlement, paying just $14 million to compensate millions of customers nationwide. This settlement will have ripple effects throughout the businesses of the affected customers, as well. For instance, HCA has continued to object in this case to fight the effects that Aon's practices have had on the costs of health care. Allowing an offend-

ing party such as Aon to profit so enormously and then settle on a nationwide basis so inexpensively not only fails to deter similar future conduct, but encourages it. At a time when health care costs are of such importance to our national economy—not to mention the other sectors that would be affected—this case takes on added significance.

CONCLUSION

The petition for writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted.

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JULY 2009

APPENDIX

APPENDIX A

107742 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

March 25, 2009

Mr. Robert J. Zaideman
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Chicago, IL 60606

No. 107742 - Alan S. Daniel et al., etc., respondents, v. Aon Corporation et al., etc., respondents (HCA, Inc., petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 29, 2009.

107738 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
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SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

March 25, 2009

Mr. Robert J. Zaideman
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No. 107738 - Alan S. Daniel et al., etc., respondents, v. Aon Corporation et al., etc., respondents (Bridgestone Americas Holdings, Inc., et al., petitioners). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 29, 2009.

APPENDIX B

Nos. 1-06-0240,
1-06-1167, 1-06-1168, 1-06-1193, 1-06-1194,
1-06-1223, 1-06-1225, 1-06-1226, 1-06-1261,
1-06-1270, 1-06-1271, 1-06-1458, 1-06-1459,
1-06-1460, 1-06-1467 and 1-06-1557 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALAN S. DANIEL, et al., on behalf of themselves and all other persons similarly situated, Plaintiffs-Appellants, v. AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AFFINITY INSURANCE SERVICES, INC., K&K INSURANCE SPECIALTIES, INC., and K&K INSURANCE GROUP, INC. (d/b/a K&K INSURANCE AGENCY, INC.), Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 99 CH 11893 Honorable Julia M. Nowicki, Judge Presiding.

ORDER

Upon consideration of the Petition for Rehearing filed by OBJECTOR-APPELLANTS HUNTSMAN CORPORATION, BRIDGESTONE AMERICAS HOLDING LLC, HCA INC., NECHES GULF MARINE, and HORNBECK OFFSHORE SERVICES, on July 10, 2008.

IT IS HEREBY ORDERED that said Petition for Rehearing is DENIED.

ORDER ENTERED

NOV 10 2008

APPELLATE COURT,
FIRST DISTRICT

/s/ Calvin C. Campbell
JUSTICE

/s/ P. Scott Neville Jr.
JUSTICE

/s/ Michael J. Murphy
JUSTICE

APPENDIX C

FOURTH DIVISION
JUNE 19, 2008

CORRECTED COPY

Nos. 1-06-0240,
1-06-1167, 1-06-1168, 1-06-1193, 1-06-1194,
1-06-1223, 1-06-1225, 1-06-1226, 1-06-1261,
1-06-1270, 1-06-1271, 1-06-1458, 1-06-1459,
1-06-1460, 1-06-1467 and 1-06-1557 (Consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALAN S. DANIEL, et al., on behalf of themselves and all other persons similarly situated, Plaintiffs-Appellants,	)	Appeal from the Circuit Court of Cook County.
v.	)	
AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AFFINITY INSURANCE SERVICES, INC., K&K INSURANCE SPECIALTIES, INC., and K&K INSURANCE GROUP, INC. (d/b/a K&K INSURANCE AGENCY, INC.), Defendants-Appellees.	)	No. 99 CH 11893 Honorable Julia M. Nowicki, Judge Presiding.

ORDER

In this case, we are asked to review a class action settlement involving the business relationship between insurance companies and insurance brokers. Alan S. Daniel, *et al.* (The Daniel Class), and numerous other group and individual objectors, appeal from multiple orders of the circuit court of Cook County approving a settlement reached between the Daniel Class and defendant, Aon, the world's second largest insurance broker and the world's largest reinsurance broker.[1]

The Settlement

On July 28, 2004, the trial court certified a nationwide class based on plaintiff's theory of a "constructive trust." The Daniel Class and Aon reached settlement on March 9, 2005. At a hearing on the fairness of the settlement (the fairness hearing), a number of class members objected, arguing that the settlement was not fair, the contents of the notices to class members were improper, and the amount of attorneys fees awarded was improper. The trial court rejected the objectors' arguments and approved the settlement, notice, and attorneys fees. The objectors timely appealed the settlement, the notices of settlement and attorneys fees.

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[1] The defendants in this case are Aon Corporation, Aon Group, Inc., Aon Services Group, Inc. Affinity Insurance Services, Inc., K&K Insurance Specialities, Inc. and K&K Insurance Group, Inc. All defendants are directly or indirectly controlled by Aon Corporation and are wholly owned subsidiaries. As such, defendants are hereinafter referred to collectively as "Aon."

The Objectors

The parties fled a total of fifteen briefs on appeal. For the purposes of this opinion, we refer to all appellants collectively as "objectors" unless the context of the discussion calls for specific reference to the particular objector. The objectors are comprised of multiple groups with overlapping interests. The objectors raised numerous challenges throughout the settlement process. While many of the objectors filed separate briefs, most objectors incorporated arguments already presented in other briefs.[2]

I. BACKGROUND

A. Insurance Brokerage Business

The record reveals the following relevant facts. As an independent insurance brokerage expert, Aon determines which insurance product best fit its client's needs, and then matches the optimal insurance product from various insurance companies to the client.

Insurance brokers generally receive compensation in one of two ways: in the form of flat fees from clients purchasing the insurance or as compensation from the insurance company providing the product to the client on a standard commission basis. A standard commission is a flat percentage of the total insurance premium, regardless of how many policies are sold.

This case involves a third type of compensation received by Aon from the insurance companies:

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[2] We dismissed the appeal of the Attorney General of the State of Florida and the Florida Department of Financial Services after being notified that theses parties entered into a settlement agreement with Aon on May 21, 2008.

contingent commission payments. Contingent commission payments are payments made by the insurance companies in exchange for Aon's steering of business in their direction.

B. Daniel Class Action Lawsuit

In August of 1999, Alan S. Daniel and Williamson County Agricultural Association, on behalf of themselves and all other persons similarly situated, filed a class action against Aon and its subsidiaries. In count I of its third amended complaint, the Daniel Class alleged breach of fiduciary duty, abuse of a confidential relationship, inducement to breach fiduciary duty, and inducement to abuse a confidential relationship. Count II of the complaint alleged conspiracy to breach a fiduciary duty. Count III alleged that Aon violated the Illinois Uniform Deceptive Trade Practices Act. 815 ILCS 510 (West 1998). Count IV alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 ILCS 505 (West 1998). In count V, the Daniel Class alleged unjust enrichment.

The complaint defines the Daniel Class as follows:

> "All US Policyholder Clients who directly or indirectly employed the services of a direct or indirect subsidiary of Aon to place, renew, consult on or service insurance or other similar risk solutions products between January 1, 1994 and December 31, 2004, wherein Aon received or was eligible to receive Contingent Commissions, including consideration in the form of a bonus, commission or profit sharing (other than

fixed consideration based solely upon the actual amount charged by the insurer for the insurance and earned upon the commencement of the insurance)."

C. State Attorney General Lawsuits

While the Daniel Class action case proceeded in Illinois state court, the attorneys general of Illinois, Connecticut, and New York, along with the Superintendent of Insurance of the State of New York and the Director of the Division of Insurance of the Illinois Department of Financial and Professional Regulation, filed complaints against the various insurance companies and brokers on behalf of the consumers of each state. The New York Attorney General complaint, for example, cited a variety of improper behavior from corporate management at a number of Aon's subsidiaries. The complaint alleged that the improper scheme to obtain compensation in the form of contingent commissions had been central to Aon's business model.

D. Attorney General Settlement

The attorneys general reached a settlement with Aon on March 4, 2005 ("AG Settlement"). The AG Settlement required that Aon reform a number of their long-standing business practices. The reforms were substantial; implementation of the reforms cost Aon between $6 and $8 million dollars a year.

The injunctive relief required that Aon: (1) accept only specific fees and/or a specific percentage commission on the premium as compensation; (2) disclose commissions in writing and obtain the consent of the client; (3) not accept or request any contingent commissions; (4) not accept from or

request of any insurer any compensation in connection with Aon's selection of insurers from which to solicit bids for its clients; (5) solicit only bona fide quotes from insurers; (6) not accept or request any promise from an insurer to use Aon's reinsurance brokerage or other services in connection with Aon's selection of insurers from which to solicit bids for its clients; (7) use a wholesale broker only after disclosing compensation to be received by Aon, Aon's interest in or agreements with the wholesalers and any alternatives to using a wholesalers; (8) disclose to clients all quotes received from insurers, Aon's contracts or other relationships to those insurers, and the compensation to be received by Aon for each quote; (9) disclose to each client at the end of the year all compensation Aon received or contemplates receiving in connection with a client's policy or policies; and (10) implement company-wide written standards of conduct regarding compensation from insurers.

Additionally, the AG Settlement required that Aon pay $190 million to an "opt-in" settlement. The opt-in settlement applied to Aon clients who retained Aon to place, renew, consult on or service insurance from January 1, 2001-December 31, 2004. The settlement allowed applicable individuals or corporations to affirmatively opt-in. All individuals who purchased insurance within the above noted time period who declined to "opt-in" to the AG Settlement could pursue their own individual (or class action) claims.

E. Daniel Settlement

On March 9, 2005, shortly after Aon reached settlement with the attorneys general, Aon and the

Daniel class also reached settlement (the "Daniel Settlement"). The settlement agreement contained nearly identical injunctive relief. The Daniel Settlement also provided for additional money for Aon's U.S. Policyholder Clients who purchased insurance between January 1, 1994, and December 31, 2004. The agreement required that Aon create a fund in the amount of $38 million for distribution to said U.S. Policyholders clients.

The Daniel Settlement also included a series of provisions that require the unclaimed funds from the AG Settlement to "spillover" into the Daniel Fund. The effect of the spillover was that the entirety of the AG Settlement is distributed to the "wronged" consumers. The spillover funds would then be distributed to U.S. Policyholders clients who purchased policies between January 1, 1994, and December 31, 2004.

The Daniel Settlement Agreement defines class or class members as follows:

> "All U.S. policyholders' clients, who directly or indirectly employed the services of a direct or indirect subsidiary of AON to place, renew, consult on or service insurance or other similar risk solution products between January 1, 1994 and December 31, 2004, wherein AON received or was eligible to receive contingent commissions."

The Daniel Settlement Agreement defines "contingent commissions" as follows:

> "Compensation (other than a specific fee to be paid by the client, or a specific percentage commission on a premium to be paid by the insurer set at the time of purchase, renewal,

> placement or servicing of the insurance policy, or both) that is contingent upon Aon's: (i) placing a particular number of policies or dollar value of premium with the insurer, (ii) achieving a particular level of growth in the number of policies placed or dollar value of premium with the insurer, (iii) meeting a particular rate of retention or renewal of policies in force with the insurer, (iv) placing or keeping sufficient insurance business with the insurer to achieve a particular loss ratio or any other measure of profitability, (v) providing preferential treatment in the placement process, including but not limited to the giving of last looks, first looks, rights of first refusal, or limiting the number of quotes sought from the insurers for insurance placements, or (vi) obtaining anything else of any material value from the insurer."

The last part of this definition is critical. The Daniel Settlement Agreement defined "contingent commissions" broadly. The settling parties included in the definition situations in which Aon "obtain[ed] anything else of material value from the insurer."

The trial court noted that the total amount that would ultimately spillover into the Daniel Fund would be $49 million. Thus, the total amount available for distribution to Aon customers that purchased policies between January 1, 1994, and December 31, 2004 was $87 million.[3]

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[3] An estimated $49 million in spillover funds and $38 million in "new money."

Ultimately, the trial court awarded $19 million in attorneys fees based on the $87 million figure. This figure represented 23% of the net settlement fund. The trial court analyzed the attorneys fees under the Lodestar method and found that the 3.33 multiplier was reasonable.

In addition to the $19 million set aside for attorneys fees, $5 million of the settlement is allocated for the distribution and administration of the settlement. If, after distribution, any of the $5 million remains, that money reverted to Aon.

F. Meade Monger

Aon retained expert economist Meade Monger and his company, AlixPartners, to administer the Daniel Settlement and provide notice to class members. AlixPartners and Monger were not hired to opine as to damages in the case; rather, AlixPartners focused solely on administering the settlement and notice.

On September 30, 2005, the trial court granted objectors' motions for discovery with respect to the documents based on Monger's affidavit submitted in support of the fairness of the settlement administration. The objectors were also permitted to cross-examine Monger at his deposition given in connection with administration of the settlement.

Later, at a hearing on October 28, 2005, objectors stated that they planned on presenting expert testimony to contradict testimony given by Monger. However, by the time of the fairness hearing on December 7, 2005, the objectors stated that they were unable to provide any expert testimony in support of their position or in opposition to Monger's

testimony. The objectors never presented any expert testimony in support of their position.

G. Fairness Hearing

At the fairness hearing, objectors raised numerous challenges to the settlement. They argued that the circuit court erred in applying Illinois law to a nationwide class. They maintained that the settlement was inadequate because it forced hundreds of thousands of class members to relinquish their claims without receiving any benefits and that the settlement failed to satisfy the standards applied in analyzing class action settlements. The objectors further claimed that the proposed class notice was inadequate and omitted critical information. The objectors argued that they should be entitled to discovery in the negotiations between Aon and class counsel that ultimately led to settlement. Finally, the objectors argued that the attorney fees were excessive.

H. Rausser Declarations

On February 28, 2006, objector Dale Johnson Trucking, Inc. filed the declarations of Dr. Gordon Rausser. Thereafter, the settling parties filed a joint motion to strike the declarations as untimely. Dale Johnson filed the declarations more than two months after the fairness hearing.

As acknowledged by Dale Johnson Trucking, Inc., Dr. Rausser prepared the declarations for the MDL litigation, not the Aon litigation before this court[4]. While the Declarations do mention Aon and

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[4] A parallel case against a number of insurance brokers pending in federal court in the Northern District of New Jersey at the time of this appeal ("MDL Case"). *In re Insurance*

the improper contingent commissions, the Declarations are not specific to Aon. Instead, the Declarations appear to criticize the entire insurance and insurance brokerage industry.

At the hearing on the joint motion to strike, Dale Johnson Trucking argued that while the Rausser Declarations were not expert reports directly dealing with the Daniel settlement, they did demonstrate that the MDL claims were viable and the conspiracies alleged in those claims were plausible. Dale Johnson further argued that, while the declarations dealt specifically with the MDL case, the declarations addressed the strengths and values of the claims at issue in the Daniel case. On April 18, 2006, the trial court granted the settling parties' motion to strike the Rausser Declarations, explaining that submission of such evidence following the fairness hearing would be prejudicial.

II. Appeal

On appeal, in addition to reasserting the arguments raised at the fairness hearing, the objectors claim the trial court erred in striking the objectors' filing of an expert affidavit. Objectors also claim that the named plaintiffs are inadequate representatives of the entire class in that they are in conflict with and fail to represent class members who will receive nothing from the settlement.

The trial court also ruled that both the Florida Department of Financial Services and Signum LLC lacked standing to intervene for the purposes of objecting. Both entities appeal that ruling.

Brokerage Antitrust Litigation, Nos. 04-5184 (FSH), 05-1079(FSH), 2006 WL 2850607 (D.N.J. Oct. 3, 2006).

The objectors further claim that there was no "meeting of the minds" between the Daniel Class and the Aon defendants and thus, no valid settlement contract exists.

Finally, as noted above, throughout the life of this case, the parallel MDL litigation was pending in New Jersey. *In re Insurance Brokerage Antitrust Litigation*, Nos. 04-5184 (FSH), 05-1079(FSH), 2006 WL 2850607 (D.N.J. Oct. 3, 2006). The plaintiff class there alleged that defendant insurance brokers (including Aon) perpetrated a "massive scheme to manipulate the market for commercial insurance." The lead objector in this case, Dale Johnson Trucking, Inc., (Dale Johnson) discussed the MDL litigation at length in its brief, arguing that the class members here have a better alternative avenue of redress via the MDL litigation.

The MDL litigation, however, was recently dismissed with prejudice to reinstate. *In re Insurance Brokerage Antitrust Litigation*, Nos. 04-5184(GEB), 05-1-79(GEB)(D.N.J. Sept. 28, 2007). Therefore, we need not address this speculative argument.

III. Standard of Review

The applicable standard of review for all issues in this case, unless otherwise noted, is abuse of discretion.

A. Application of Illinois Law to a Nationwide Class

Certain objectors contend that the trial court erred by applying Illinois law to a nationwide class of policyholders and that state law variations should preclude the approval of a national class action

settlement. These objectors argue that because "liability [must] be determined according to varying and inconsistent state law, the common question of law or fact prerequisite (for a class action) will not be fulfilled." *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, 1314 (1977).

Other objectors claim that the application of Illinois law to a nationwide class is improper in this case. While these objectors do not argue against certification *per se*, they imply that if the application of state law is improper, the class should not have been certified. These arguments are sufficiently related.

Most objectors indirectly attack class certification by challenging the fairness of the settlement. *See Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157, 166-67 (1999). We need not address the appropriateness of nationwide class certification. *Steinberg* is instructive and, accordingly, we decline to consider whether the trial court erred in certifying the class prior to settlement. Nevertheless, like the *Steinberg* court, we will consider any potential due process concerns raised in this case.

IV. Choice of Law

The objectors argue that Illinois law cannot apply to a nationwide class of policyholders. The argument is two-fold. First, we must determine whether Illinois law *can* apply to a nationwide class of insureds that obtained insurance through Aon. Critical to the first question is whether or not Illinois choice of law rules permits Illinois law to apply to a nationwide class of policyholders. The second closely related question is whether Illinois law *should* apply.

In answering the second question, we must determine whether the trial court is required to canvass the laws of all fifty states prior to certifying a nationwide class under Illinois law.

A. Illinois Law

Appellate review of a trial court's choice-of-law decision is reviewed *de novo*. *Malatesta v. Mitsubishi Aircraft International, Inc.*, 275 Ill. App. 3d 370, 384 (1995). While the settling parties urge this court to review this matter using an abuse of discretion standard, that standard only applies to the overall certification of the class, not the choice of law applicable to the class or subclasses. Compare *Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157, 169 (1999) (plaintiff class addressing certification standard of review) with *Morris B. Chapman & Associates, Ltd. V. Kitzman*, 307 Ill. App. 3d 92, 99 (1999), (specifically addressing state choice of law issues). While the questions in the class action context are undoubtedly related, each issue is specific and distinct. As such, we review the trial court's application of Illinois law to a nationwide class *de novo*.

For choice of law questions, Illinois adopts the most significant contact test articulated in the Restatement (Second) of Conflict of Laws (1971). *Esser v. McIntyre*, 169 Ill. 2d 292, 298 (1996). The most significant relationship test requires a court to consider "(1) where the injury occurred; (2) where the injury-causing conduct occurred; (3) the domicile of the parties; and (4) where the relationship of the parties is centered." *Esser*, 169 Ill. 2d at 298 (*citing Ingersoll v. Klein*, 46 Ill. 2d 42, 47 (1970)).

Objectors first complain that the trial court did not perform a state-by-state analysis to determine what law applied to the members of the class. Instead, the trial court applied Illinois law to all members of the class-members that are present in all 50 states.

In three separate opinions, the trial court applied the most significant relationship approach to the claims of the Daniel Class and each time determined that Illinois substantive law should apply. The trial court justified application of Illinois law to a national class for two reasons. First, Aon's center of business was located in Illinois, the wrongful scheme alleged was "originated, planned, orchestrated and continues to be supervised by the Aon Defendants in and from Illinois."

Second, the Daniel Class's theory of recovery justified the application of Illinois Law. At the certification stage of the case, the Daniel Class argued for class certification based upon the somewhat novel and untested theory of a "constructive trust." Under the constructive trust theory, the Daniel Class argued that each member was entitled to a pro rata share of the ill-gotten profits obtained by Aon by way of their contingent commissions. This avoided the problem of determining the out of pocket expenses of each individual plaintiff. The trial court noted that, because the case was, in effect, the Daniel Class's claim to "his/her/its fair share of the disgorgement of undisclosed commissions," the commissions are in control of Aon, and located in Illinois. Because commissions were under the control of an Illinois defendant, Illinois law applied.

The trial court properly applied the "most-significant-relationship test." The unique nature of the theory of recovery alleged in this case downplays the significance of the "location of the injury" factor articulated in Illinois choice-of-law jurisprudence. Further, the Daniel Class brought its claim against Aon based upon Aon's retention of ill-gotten funds. The injury is the result of the contractual relationship entered into by insurance purchasers, insurance brokers, and insurers.

The injury causing conduct most likely occurred in Illinois. While many class members entered into contracts in states other than Illinois, the fraudulent conduct was, as the trial court found, primarily devised and undertaken at Aon's principle headquarters in Illinois.

Objectors contend that *Avery v. State Farm Mutual Auto Insurance Co.*, 216 Ill. 2d 100, 188 (2005), precludes application of Illinois law to a nationwide class. In *Avery*, the plaintiff class brought action against an auto insurer for the insurer's failure to pay for original equipment manufactured parts for repair to insureds' damaged vehicles. *Avery*, 216 Ill. 2d at 109-110. Our Supreme Court held that the circuit court erred in certifying a nationwide class that included class members whose claims proceedings took place outside Illinois. *Avery*, 216 Ill. 2d at 190. The supreme court primarily relied in part on the fact that the named plaintiff resided in Louisiana, obtained insurance in Louisiana, his car was repaired in Louisiana, and any damages he suffered were incurred in Louisiana. *Avery*, 216 Ill. 2d 100 at 188.

This case is distinguishable from *Avery*. The conduct giving rise to the complaint in this case is

fundamentally distinct from the conduct that gave rise to the complaint in *Avery*. Here, Aon is an intermediary between individuals or companies seeking to obtain insurance and the insurance companies selling insurance. No accident gives rise to wrongful conduct, as in *Avery*. Instead, the wrongful conduct arises from improper payments made by the insurance companies to Aon; the Daniel Class sought disgorgement of illegal funds paid to Aon headquarters. The scheme was derived at Aon headquarters. Aon maintained control over the funds within the state of Illinois. Accordingly, the trial court appropriately and correctly applied Illinois law to the nationwide class.

The objectors also rely on *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), which is also distinguishable. There, the Seventh Circuit declined to apply any uniform "place-of-the-defendant's headquarters rule" in a choice-of-law analysis in determining what state law should apply to plaintiff class's breach of warranty and product liability claims. The class alleged breach of warranty and consumer fraud claims stemming from malfunctioning Firestone tires on Ford Explorers. The court stated that "if recovery for breach of warranty or consumer fraud is possible, the injury is decidedly where the *consumer* is located, rather than where the seller maintains its headquarters." *Bridgestone*, 288 F.3d at 1017.

Here, by contrast, the Daniel Class's theory of recovery was based on the fact that high ranking executives and managers at Aon and its subsidiaries wrongfully defrauded its clients by succumbing to financial incentives to steer business to particular insurers. Based upon the evidence in record, and the

conclusions of the trial court, this entire scheme was orchestrated in large part by members of Aon's upper management, located in Illinois. The wrongful conduct is not the sale of a policy in and of itself, but, rather, management's instruction to its salespeople to push certain policies based upon the fact that insurers were paying wrongful contingent commissions. Based upon the location of the wrongful conduct alleged in the complaint and the location of the wrongfully obtained profits, the trial court did not err in determining that Illinois choice-of-law rules permit Illinois law to apply to a nationwide class.

B. State-by-State Analysis and Certification

Objectors argue in the alternative that while Illinois choice-of-law *can* apply it does not necessarily follow that Illinois choice-of-law *should* apply. Objectors assert that if certain states provide more favorable rules or allow for more damages for plaintiffs, Illinois law should not apply but, rather, class or individual actions should be pursued under the most favorable laws.

Objectors thus contend that the trial court failed to perform a state-by-state analysis prior to approving the settlement, noting that courts regularly examine the propriety of a trial court's certification of a nationwide class if the certification and subsequent settlement raise due process concerns. *Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157, 167 (1999); quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed.2d 689 (1997). Decisions regarding class certification are within the sound discretion of the trial court and are overturned only

in if the trial court abused its discretion. *Avery*, 216 Ill. 2d at 188.

While the trial court did not perform a state-by-state analysis of the law that could be applied to the nationwide class of plaintiffs, the trial court did "not disagree that such a state-by-state analysis is a viable approach." Instead, the Court found that the "plaintiff's' complaint articulates a particular theory of recovery that constitutes another valid and reasonable analysis by which the alleged wrongs sustained may be redressed." We address the trial court's decision not to perform a state-by-state law analysis.[5]

The objectors argue that a trial court should "consider and analyze the full cross-section of potentially applicable state law" to estimate the potential value of a class's claims prior to approving settlement. *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 751 (7th Cir. 2006). (*Mirfasihi II*). The *Mirfasihi II* court required an analysis of state laws in light of the trial court's duty to "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Mirfasihi II*, 450 F.3d at 748 (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002).

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[5] We will not address all the requirements for class certification, as most requirements are not at issue here. Objectors primary argument is that the trial court is required to perform a state-by-state analysis of potentially applicable laws to judge the potential recovery in the case. We acknowledge that the state-by-state analysis is essentially a question concerning the predominance requirement; that is, whether common questions of law predominate over the class.

Mirfasihi is distinguishable. There, initially, the Seventh Circuit focused on numerous questionable features of the settlement, specifically stressing that the settlement could not be approved when the agreement denied relief to an entire class and where the trial court failed to consider whether the class denied relief could recover under differing state laws. *Mirfasihi*, 356 F.3d 781, 785 (*Mirfasihi I*); *Mirfasihi II* at 751.

Here, unlike *Mirfasihi II*, objectors argue that, because some states afford greater recover under their consumer protection statutes,[6] the trial court was required to perform an analysis of potentially applicable state laws. It is neither the role nor duty of the trial court, however, to determine whether the proposed settlement has achieved perfection. *Mangone v. First USA Bank*, 206 F.R.D. 222, 227 (S.D. Ill. 1999). Rather, as guardian of the interests of absent class members, the court must determine whether the compromise settlement of a class action is fair, reasonable, and adequate. *Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157, 169 (1999); *Lagendorf v. Irving Trust Co.*, 244 Ill. App. 3d 70, 78 (1992). No rule requires a trial court to canvas the laws of all fifty states. Rather, the settlement must be determined to be fair, reasonable and adequate.[7]

We find that Illinois law can and should apply to the nationwide class. Accordingly, we find no abuse of discretion in the application of Illinois law to the nationwide class.

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[6] Specifically, Objector Signum, LLC claims South Carolina antitrust law could provide for treble damages in this case.

[7] The fairness of the settlement is addressed below.

V. Intra-Class Conflict and Necessity of Subclasses

A. Temporal Groups

Various objectors argue that, as a result of intra-class conflicts, the settlement reached in the case at hand is unreasonable for certain potential subclasses. For example, the Huntsman objectors claim that two groups, the 1994-2000 temporal group and the 2001-2004 temporal group are in direct conflict.[8]

This claim lacks merit. The mechanism of both the AG Settlement and the Daniel Settlement works as follows: If a class member from the 2001-2004 temporal group elects to participate in the AG Settlement, the amount they would be entitled to under the Daniel Settlement is compared to that amount they would be entitled to under the AG Settlement. If the amount they are entitled to receive under the Daniel Settlement is greater than that of the AG Settlement, the funds first came from the AG Settlement and the difference is taken from the Daniel Settlement.

Objectors do not reveal how the participation of the 2001-2004 group conflicts with the 1994-2000 group. While objectors allege that every dollar taken from the fund by the 2001-2004 group reduces the

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[8] The 1994-2000 temporal group includes all clients that obtained insurance policies through Aon during this period. Likewise, the 2001-2004 group includes all clients that obtained insurance policies between 2001-2004. Importantly, the 2001-2004 group members were eligible to receive a share of the $190 million available in the AG Settlement. The 1994-2000 temporal group was not eligible for compensation under the AG Settlement.

potential funds available to the 1994-2000 group, this allegation does not necessarily place the group in conflict. Ultimately, the 1994-2000 group would hope that as many 2001-2004 members as possible would participate in the Regulatory Settlement. In effect, the participation in the AG Settlement would preserve funds for the 1994-2000 group. Nevertheless, it is the choice of each individual 2001-2004 class member whether or not to participate in the AG Settlement. The distribution mechanism devised by the settling parties was the result of the parties attempts to prevent double recovery by the 2001-2004 group (by participating in both the AG Settlement and the Daniel Settlement, with no offset). Plainly, the mechanism devised by the parties does preserve as much money as possible for the 1994-2004 group because it first takes money from the AG Settlement and satisfies the difference with money from the Daniel Settlement. With this mechanism in place, all money remaining is equally distributed to all class members from the 1994-2004 class based upon the proportion of premiums paid by class members. We find this settlement mechanism appropriately avoids any potential conflict between temporal class members.

B. $25 Threshold

In order to facilitate the efficient distribution of the settlement, the trial court set a $25 threshold for distribution of the settlement funds; that is, class members with claims valued at less than $25 would not receive a distribution. Instead, the funds of those class members with small claims would be reallocated to class members with claims greater than $25.

The threshold appears to be set for the purposes of efficiency. Aon did not propose such a threshold. Class counsel proposed the threshold because "we were dealing here with business litigation where major companies are buying expensive insurance through a world class broker." Class counsel stated that they would be willing to set the threshold lower. Nevertheless, the court approved the cap.

Objectors now argue that the trial court failed to adequately represent the interest of the class members with the smallest claims: those with claims under $25. A settlement that is unfair to a subclass or a fraction of the class should not be sustained. *Waters v. City of Chicago*, 95 Ill. App. 3d 919, 924 (1981). That being said, it is clear that *some* threshold must be set for distribution of settlements in a class action. It would be economically inefficient to distribute five dollars to a class member if it cost the class $25 to do so. There is no Illinois case law on point.

While we do not find that a $25 threshold would be appropriate in all class action cases, here, all class members received benefits in the form of non-monetary business reforms. All class members, including those with small claims, were adequately represented as class counsel was open to lowering the threshold as low as the court deemed fit. The court, in its discretion, determined that $25 was an appropriate threshold to promote the efficiency of distribution.

C. Contractual Relationship

Objectors further argue that the contracts between members of the class and the insurance brokers will vary greatly across the class and that

these variations "necessarily create conflicts between the merits of one class member's claims under one form of contract and another class member's claims under a different form of contract." This argument is without merit. Objectors fail to cite any contracts or specifically conflicting provisions. Objectors also fail to explain how variations would cause conflict. The objectors have failed to articulate or cite to any clear conflict arising out of the varying contracts.

D. Differing State Laws

Finally, as addressed above, objectors argue that potentially differing state laws will cause conflict among class members. For example, objectors argue that Vermont law is more friendly to insurance brokers than is California, Louisiana and Texas law. Thus, objectors argue, those members in states with favorable law are in conflict with those individuals in states with law more friendly to insurance brokers.

Presumably, those class members with claims in states less friendly to insurance brokers would demand a higher settlement. Conversely, those class members in states more friendly to insurance brokers would be willing to settle for less. Objectors claim that these differences in state laws pose a conflict between class members and, as such, the settlement must be rejected.

Again, the trial court is the guardian of the interests of absent class members, and the court must determine whether the compromise settlement of a class action is fair, reasonable, and adequate. *Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157, 169 (1999); *Lagendorf v. Irving Trust Co.*, 244 Ill. App. 3d 70, 78 (1992). A settlement need not be perfect to be fair, reasonable, and accurate.

Mangone v. First USA Bank, 206 F.R.D. 222, 227 (S.D. Ill. 1999). While certainly some class members might reside in a state that is more advantageous for class litigation, subtle differences in state law do not rise to the level of conflict between class members. As is always the case, if a class member determines that they are much better of litigating under their own state laws, they may opt-out.

VI. The Adequacy of the Settlement

Objectors further claim that the trial court abused its discretion in approving the class action settlement. We disagree.

Pursuant to 735 ILCS 5/2-806, a settlement agreement reached by the parties in a class action must be approved by the trial court. The trial court's decision in approving a class action settlement may be reversed only on a clear showing that the trial court abused its discretion. *Steinberg*, 306 Ill. App. 3d at 169. As a general matter, "the standard to be used in evaluating the compromise of a class action is that the agreement must be fair, reasonable, and adequate." *Steinberg*, 306 Ill. App. 3d at 169 quoting *Lagendorf v. Irving Trust Co.*, 244 Ill. App. 3d 70, 78 (1992).

A. Korshak Factors

In evaluating whether a class action is fair and reasonable, courts consider the following factors: (1) the strength of the plaintiff's case on the merits, (2) the defendant's ability to pay, (3) the complexity, length and expense of further litigation, (4) the amount of opposition to the settlement, (5) the presence/absence of collusion in reaching the settlement, (6) the reaction of members of the class to the settlement, (7) the opinion of competent

counsel, and (8) the stage of the proceedings and the amount of discovery completed. *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 971-72 (1990).

The strength of plaintiff's case on the merits balanced against the settlement amount is the most important factor in determining whether a settlement should be approved. *Steinberg*, 306 Ill. App. 3d at 170, citing *Korshak* 206 Ill. App. 3d at 872.

Further, the trial court noted that Aon would likely continue to argue that the laws of all 50 states would apply to each class member and the differing state laws, as applied to the insurance industry and consumers, might preclude class certification. The trial court acknowledged that Aon would continue to question class certification based upon the knowledge class members possessed regarding Aon's receipt of contingent commissions. Again, the court simply acknowledged that Aon could continue to make these arguments against nationwide class certification on appeal.

The trial court also recognized Aon's potential defenses for trial and noted that Aon would argue that even if a fiduciary duty did exist between plaintiffs and Aon, as a general rule, a fiduciary has no duty to disclose its compensation.

The trial court properly recognized that the risks of the case primarily involved the potential for de-certification of the class and the difficulties in succeeding in the case at trial. The court thoroughly and properly evaluated these risks. Throughout the litigation, Aon maintained the position that it could succeed at trial and could potentially successfully decertify the nationwide class on appeal. The

settlement reached by the parties in this case eliminate this risk. Further, the estimated $87 million in relief obtained by class counsel on behalf of the class is substantial.

The second *Korshak* factor is the defendant's ability to pay. The trial court found that Aon represented that it had the ability to provide the settled upon relief. We agree.

The third factor is the complexity, length and expense of further litigation. There is no doubt that the continued litigation of this matter would prove to be immensely complex, expensive and lengthy. All parties represented that additional discovery was pending and that a number of outstanding subpoenas for depositions are pending. Undoubtedly, Aon would continue to pursue an appeal of the nationwide class certification were plaintiffs to succeed at trial. This case was filed in 1999 and, in all likelihood, would require years to resolve had the parties not agreed on a settlement. Thus, we find the third factor favors approval of the settlement.

The fourth factor is the amount of opposition to the settlement. The trial court certified a class of approximately 1.5 million members. Fifty objections were filed. Only nine objections were presented at the fairness hearing. The trial court properly held that the minimal opposition to the settlement weighed in favor of approving the settlement.

The fifth factor is the presence or absence of collusion. This case was litigated for five- and-a-half years before the parties reached a settlement. Aon brought numerous potentially dispositive motions and vigorously opposed class action certification. The

particular facts of this case do not suggest the presence of collusion.

The sixth factor is the reaction of members to the class settlement. The sixth factor is closely related to the fourth factor. Here, of the 1.5 million class members, only 500 elected to opt out of the settlement. Further, the trial court found that many sophisticated corporations that initially opted out of the class, later opted back in to participate in the settlement.[9] The court found that the minimal opt outs coupled with the decision of sophisticated class members to opt back in indicated the class strongly supported the settlement. This court declines to second guess the trial court's finding.

The seventh factor is the opinion of competent counsel. In this case, counsel for both the plaintiff class and Aon consider the settlement to be fair, reasonable, and in the best interest of the parties. The trial court noted that both sides spent five years vigorously litigating the case before ultimately reaching settlement. Again, we agree with the trial court's findings.

The eighth and final factor is the stage of the proceedings and the amount of discovery completed. The trial court found that over the course of the litigation of the case, significant discovery was conducted by the parties. The trial court found that nearly a half-million documents were produced during the litigation. AlixPartners gathered millions of records regarding contingent commissions during

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[9] The court found that American Airlines, Deere & Company, Exelon Corp., HSBC Finance Corp., Pacific Gas & Electric, Time Warner, Tribune Company, and USA Truck all opted back in to the settlement.

the development of the Daniel Fund. While certainly more discovery might have been taken in the case, the fact remains that the parties had exchanged substantial volumes of documents and data. The trial court did not err in its analysis of this factor.

In light of its carefully reasoned analysis along with its familiarity with the parties and the case, the trial court's determination that the settlement was both reasonable and in the best interests of all the parties was not an abuse of discretion.

B. Trial Court's Failure to Quantify the Net Expected Value of the Case

Various objectors place substantial emphasis on the trial court's failure to precisely quantify the total potential value of the case when considering the adequacy of the settlement. The objecting parties rely heavily on *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002). There, the Seventh Circuit reversed the trial court's approval of a class action settlement arising out of a tax preparer and a Bank's improper collusive dealings. The objectors here argue that this case stands for the proposition that a judge *must* "quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate." *Reynolds*, 288 F.3d 277, 284-85.

The *Reynolds* court held that the judge performed an inadequate assessment of the potential value of the case. However, in *Reynolds*, the Seventh Circuit court placed heavy emphasis throughout its opinion on the questionable circumstances involving the settlement. First, the lawyers that ultimately petitioned the court for a settlement had a suspicious lunch meeting with counsel for the defendants.

Reynolds, 288 F.3d 277, 280-81. Second, the court noted that, at the time of the meeting, it was "doubtful" that any of the three practitioners even had a client. *Reynolds*, 288 F.3d 277, 280-81. Finally, the court at least noted that the plaintiff class lawyers and defense lawyers might be partaking in a "reverse auction" whereby the defendants essentially sell the settlement to the lowest bidder (bidder being lawyer, in such a case). The higher level of scrutiny required in *Reynolds* was the result of the suspicious and questionable circumstances surrounding the settlement.

This case distinguishable from *Reynolds*. Unlike the *Reynolds* class counsel, class counsel here litigated the case vigorously for five years. Substantive and potentially dispositive motions were filed throughout the litigation and there is absolutely no evidence of suspicious circumstances or questionable lunch meetings, as in *Reynolds*.

Some courts, including the Seventh Circuit, have gone so far as to term the trial judge "in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries." *Reynolds*, 288 F.3d 277, 280 (citing *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002); *Stewart v. General Motors Corp.*, 756 F.2d 1285, 1293 (7th Cir. 1985); *In re Cendant Corp. Litigation*, 264 F.3d 201, 231 (3d Cir. 2001); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987). Under such an analysis, the trial judge must exercise the "highest degree of vigilance in scrutinizing proposed settlements of class actions." *Reynolds*, 288 F.3d 277, 280-81.

Nevertheless, *Reynolds* does not require the trial judge to make a precise calculation of the potential for recovery in every class action that eventually settles, but only in light of the suspicious circumstances of each case. Here, the trial court relied, at least in part, on the analysis of AlixPartners in its estimate that Aon collected approximately $362 million in contingent commissions between 1994 and 2000. The trial court considered these numbers in light of the potential weaknesses of the plaintiff class's case in approving the settlement.

In analyzing the fairness of a class action settlement, "the dollar amount of the settlement by itself is not decisive of the fairness determination." *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (D.C.N.Y. 1984). The trial court's failure to determine the precise potential value of the settlement, were the plaintiffs to succeed, does not, in and of itself, require this court reverse the trial court's approval of the settlement. Here, the trial court carefully applied the *Korshak* factors in approving the settlement. The trial court's well-reasoned analysis of the risks of the litigation, coupled with the utter lack of suspicious circumstances surrounding the settlement, leads us to affirm the trial court's approval of the settlement.

C. Class Members That Receive No Monetary Compensation

The objectors also argue that the settlement is inadequate as it fails to provide any monetary relief to certain members of the class. In light of the lack of monetary compensation for certain class members, the objectors contend that the named plaintiff and class counsel inadequately represented the interest

of these uncompensated class members. Objectors claim that approximately 800,000 class members will receive no consideration in exchange for the release of their claims.

Objectors frame the problem as follows: the class definition covers those policyholders who obtained insurance through Aon wherein Aon received or was eligible to receive contingent commissions. This definition covers two categories of policyholders—those whose insurance policies were subject to performing contingent commission contracts and those whose insurance policies were subject to non-performing contingent commission contracts.[10] In the end however, according to Aon's expert, Meade Monger, only those policyholders with performing contingent commission contracts receive any monetary benefits. Thus, the policyholders with policies subject to non-performing contingent commission contracts release their claims but receive no money.

The settling parties argue that all class members receive benefits in the form of injunctive relief and reformed business practices instituted through the settlement. Indeed, case law suggests that non-monetary relief can be taken into account in considering the fairness of a settlement. *Hanrahan v. Britt*, 174 F.R.D. 356, 367 (E.D. Pa. 1997); *Lagendorf v. Irving Trust Co.*, 244 Ill. App. 3d 70, 79

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[10] Performing contingent commission contracts are policies where Aon met its sales goal and received money from the insurance companies in connection with meeting said goals. Non-performing contingent commission contracts are those policies where Aon was eligible to receive such a commission had it met its goal but did not because it failed to meet the sales requirement.

(1992) (abrogated by *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235 (1995) on separate grounds). The objectors acknowledge this authority but suggest that the non-monetary benefits will be in place regardless of whether or not the benefits become a part of the Daniel Settlement.

The record shows that the injunctive relief is in place under the Attorneys General Settlement (AG Settlement), reached five days before the Daniels Settlement.[11] The Attorneys General negotiated for identical business reforms and Aon is bound by its settlement with the Attorneys General. No party suggests that the Daniel Settlement provides any injunctive relief over and above that provided by the AG Settlement.

While it is undoubtedly correct that, absent this settlement, those business reforms would be enforceable through the AG Settlement, we do not accept the position that this litigation played no role in catalyzing the reform of insurance brokerage practice. This litigation began long before any Attorney General investigation. Whether it played a primary role or a minor role is something best suited for determination by the trial court.

The claim that the injunctive relief is mere quid pro quo for certain members of the class is compelling but irrelevant. Those individuals whose policies were not subject to contingent commission contracts (and therefore, will not recover any monetary funds) did receive benefits from the reforms put in place. Further, no objector offered any

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[11] As discussed above, the Attorneys General settled with Aon on March 4, 2005. The Daniel plaintiffs reached settlement on March 9, 2005.

evidence regarding the potential damages for these class members. Finally, these class members could, if desired, opt out of the settlement and pursue individual claims.

D. Notice

Various objectors argue that notice to the Daniel Class improperly failed to adequately inform class members that some members would not receive any distribution to the class. The objectors requested the trial court inform class members about the MDL litigation which involved similar issues. The trial court declined to include information about the MDL litigation on the notices.

Because a class action must necessarily proceed in the absence of almost every class member, it is important that plaintiff class members be given adequate notice and an opportunity to be heard to satisfy the requirements of due process. *Todt v. Ameritech Corp.*, 327 Ill. App. 3d 359, 371-72 (2002). Due process entitles putative class members "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 314 (1950). Further, notice must protect each member's option not to choose to participate in the actions. *Fox v. Northwest Insurance Brokers, Inc.*, 113 Ill. App. 3d 255, 257 (1983).

In this case, notice was given to class members in three different ways. First, when the class was originally certified, the parties provided court-approved publication notice in the Wall Street Journal, USA Today, and certain trade publications

(Publication Notice). Class members were given until January 31, 2005, roughly two months from publication, to opt out of the class.

Later, when settlement was reached, an additional notice was provided to class members. This notice was individually mailed to identifiable class members (2005 Notice). The notice was published in ten newspapers and magazines. The 2005 Notice also directed class members to a website and a toll free number where they could receive additional information as it became available. While the notice provided adequate details regarding the litigation, merits, and details of the case, importantly, the notice did not provide an opportunity to opt-out of the settlement. Specifically, the notification provided class members with four options. First, they could do nothing and be bound by the decision of the Court in the case. Second, they could withdraw their previous request to be excluded and thus rejoin the class. Third, they could object in writing to the settlement. Fourth, class members could attend the fairness hearing.

Finally, after additional negotiations, class members who were eligible for a distribution under the AG Settlement were given a second opportunity to opt-out of the Daniel Settlement (Supplemental Notice). While the parties agreed that this opportunity should be provided to those Aon clients wishing to pursue individual claims, objectors demanded an unconditional opportunity to opt-out. Objectors now concede that this notice provided unconditional opt-out, but they nevertheless argue that the timing of the notice "failed to avoid the constitutional infirmities of each earlier attempt at notice."

The objector's concerns are two-fold. First, they argue that the last unconditional opt-out opportunity was provided too late--that is, after the time in which class members could file a claim under the AG Settlement. The trial court effectively approved the Daniel Settlement contingent upon the distribution of a final notice providing the unconditional right to opt out. Objectors argue that because the notice containing the unconditional opt-out was offered by the settling parties *after* the deadline to file claims under the AG Settlement, class members were effectively precluded from making an informed decision with regard to their position in the case. That is, certain class members never had the unconditional right to opt-out (because the original 2004 notice was defective and the July 2005 notice did not give the option) until after the deadline to join the AG Settlement had passed.

The second, somewhat obtuse argument presented by the Objectors, is that the Notice mailed, either in July of 2005 or the Supplemental Notice should have contained information regarding the pending MDL litigation. The record indicates that the trial court refused to advertise the MDL litigation without expressing the risks inherent to said litigation.

This court finds both arguments unpersuasive. First, adequate notice must provide class members with two things: a right to be heard and a right to not participate in the settlement or action. *Fox v. Northwest Insurance Brokers, Inc.*, 113 Ill. App. 3d 255, 257 (1983). The notice need not provide every class member with a comprehensive list of all possible courses of action they may take. Here, no party disputes that the 2005 Notice provided class

members with an opportunity to be heard. Specifically, the notice informed class members of the various ways in which they could express their opinions about the settlement to the court. The notice was mailed individually and published in numerous trade journals and magazines. While the notice arguably should have included an unconditional right to opt-out, the fact that it did not does not render it incurable.

Later in the litigation, and in light of the objectors arguments, the parties and the trial court recognized that an additional unconditional right to opt-out should be provided. The court approved the settlement on the condition that class members be notified of this unconditional right. The fact that certain class members already included in the AG Settlement did not receive this unconditional opt-out in a timely manner is irrelevant as they already have a course of relief, that is, the AG Settlement.

Lastly, this Court is not convinced that a trial court should undertake to advertise and inform class members of every pending related action in a case such as this one. The record reveals ample evidence of immense risks in both this and the MDL litigation. An attempt to explain to each individual class member the risks and rewards of participating in each class is nearly impossible and would require a trial court make judgments regarding litigation not properly before the court.

VII. Discovery of Settlement Negotiations

Various objectors argue that the circuit court erred in denying their discovery requests regarding the settlement reached by the defendants and the

class. In denying the request, the court noted that "[n]o evidence of collusion [was] presented."

We consider two countervailing concerns when determining whether or not an objector or intervenor should be granted discovery of settlement negotiations. On the one hand, allowing discovery of settlement negotiations poses a substantial threat of undermining the settlement process. *Vollmer v. Publishers Clearing House*, 248 F.3d 698 (7th Cir. 2001). Further, "discovery into settlement negotiations in ongoing litigation is unusual because it would give a party information about an opponent's strategy." *Mars Steel Corp. v. Continental Illinois Nation Bank and Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987). On the other hand, because of the substantial incentives and temptations for plaintiff class attorneys to settle a case, perhaps for less than it may be worth, courts scrutinize settlements for the presence of collusion between opponent counselors.[12] This scrutiny may occasionally require courts to open up discovery into the settlement negotiations. The law permits discovery into settlement negotiations if the party seeking discovery may "adduc[e] from other sources evidence that the settlement may be collusive." *Vollmer*, 248 F.3d at 708. In considering evidence of collusion in this context, courts may review the timing of the settlement, amount of discovery conducted, and whether or not there is evidence that class counsel is "selling out the class" to beat other attorneys to the fee. *Mars Steel Corp.*, 834 F.2d at 684.

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[12] In this discussion of class counsel, we speak generally of concerns and make no particular allegations against class counsel in this case.

Objectors argue that five facts warrant discovery into the settlement negotiations: 1) the Settling Parties failed to submit any evidence or memoranda in support of preliminary approval; 2) the Notice failed to inform Class members that the settling named class plaintiffs are to receive $10,000 as an incentive award; 3) the Settling Parties improperly attempt to take credit for the Attorney General Settlement and the Settlement improperly attempts to modify the terms of the Attorney General Settlement; 4) the settlement value of $38 million for the ten-year Class period is inadequate when compared to potential liability; 5) the Settlement was reached before the settling plaintiffs had the necessary "revenue information relating to the Class Period" requiring Aon Defendants to provide the settling plaintiffs with confirmatory discovery.

None of these facts give rise to the level of suspicion required to demonstrate the collusion between opposing parties has occurred. First and foremost, this case has been in adversarial litigation since 1999. The settling parties litigated many substantive issues before reaching settlement in March of 2005. The length of the litigation certainly suggests that collusion is not present.

Moreover, the facts referenced by the objectors also fail to demonstrate collusion. First, it is entirely unclear why the lack of a memoranda in support of preliminary approval bears any relevance to the presence or absence of collusion. The settling parties have since provided ample writings (whether adequate or not) in support of the settlement. The lack of an initial memorandum, in and of itself, does not demonstrate that the settlement is the product of collusion. Rather, at best, it demonstrates that the

settlement is the product of a mutual agreement reached by the parties.

Second, the fact that the named plaintiffs received an incentive award and that the class did not know about the incentive award does not demonstrate collusion between class counsel and the defendants. Incentive awards for named plaintiffs are now common in class action litigation. (*See generally*, Willging, Thomas E., Hooper, Laural L., Niemic, Robert J. "An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges," 71 NYU Law Review 74, 101 (April-May 1996) (finding 40% of named plaintiff in class actions in the Northern District of Illinois were given incentive awards). The presence of incentive awards for the named plaintiffs in this case is insufficient to demonstrate collusion among class counsel and the defendants.

Third, both parties argue vigorously regarding the role the plaintiffs in this case played in prompting the Attorneys General to bring suit. While plaintiffs may overstate their role, and were indeed challenged by letters from the Attorneys General, it appears that at the very least, plaintiffs brought attention to the Insurance Brokers through this litigation. Effectively, this is a question that is impossible for this court to answer and we will defer to the judgment of the trial court on this issue. Even assuming plaintiffs overstated their role in bringing about the AG Settlement, this Court would decline to equate a somewhat rhetorical overstatement to that of fraudulent and bad faith collusion.

Fourth, as discussed with respect to the adequacy of the settlement, this court finds that, although the settlement was somewhat small compared to potential liability, the risks of

continuing litigation were substantial enough to justify the relatively small award.

Fifth, this court finds that, while Meade Monger's affidavit may have been inadmissible at trial, it provided both the court and the plaintiff class in this case, information with which to judge the contingent commission revenue of Aon. Importantly, while objectors continually question the credibility of Monger's findings, they present no reliable evidence challenging said findings. The objectors plainly admit that their expert opinions, which were stricken by the trial court, were created in association with the MDL litigation, not the litigation before this court. With the exception of certain unproven statements regarding the revenue obtained through contingent commissions, objectors, despite being given access to a substantial amount of the discovery in this case, fail to articulate a more credible representation of contingent revenues. Thus, for the purposes of settlement, we find the trial court and settling parties could reasonably rely on the assertions of Monger despite the fact that he was not specifically retained to analyze damages. We affirm the circuit court's denial of discovery of settlement negotiations.

VIII. Striking of Rausser Declaration

The trial court allowed the objectors an extensive amount of written discovery in this case. The objectors now contend that they "simply slid not have either the time or the appropriate discovery to submit an expert report regarding the value of the claims released which would withstand scrutiny." On September 28, 2005, the trial court entered an order permitting objectors to conduct limited discovery. The trial court further enabled the

discovery by ordering Aon to make the documents available in electronic form and required Aon provide a technical expert to assist objectors. The lead objector in this case, Dale Johnson Trucking Co., apparently had all discovery three months prior to the fairness hearing. The trial court noted that a team of 80 attorneys had three months to review 900,000 pages of documents, yet failed to proffer any expert regarding damages.

Instead, objectors submitted the Declarations of Dr. Gordon Rausser (Rausser Declarations). As the objectors explain, the Rausser Declarations did not deal with the litigation before the trial court; rather, the declarations were reports dealing with the MDL Litigations. Not only do the Rausser Declarations deal with an entirely different action, but they were submitted six months after the original deadline for experts and two months after the initial fairness hearing.

We understand that a complex class action case requires substantial discovery and voluminous document review. Nevertheless, objectors late and seemingly unrelated expert report cannot be considered reliable or timely evidence in this case. Accordingly, we find that the trial court property struck the objectors unrelated and untimely filed declarations.

IX. Calculation of Attorney's Fees

The dispute over attorney's fees in this case is largely a dispute about how the trial court, and now this court, should treat the "spillover" funds negotiated for in the Daniel Settlement. These funds were originally negotiated for through the Attorney General Settlement. Objectors argue that Aon is, in

effect, not increasing its liability in any way whatsoever. Instead, it is simply transferring funds already owed under the AG Settlement into the Daniel Settlement.

However, this court recognizes that objectors played at least some catalytic role in the AG Litigation. Whether this role was a "substantial factor," as claimed by the objectors, is disputed by the Attorneys General. That being said, the negotiation of the spillover does benefit the specific class members in question. Under the AG Settlement, Aon could have used this spillover amount to settle any claims related to its collection of undisclosed commissions. Instead, Aon is contractually bound to distribute this money to the Daniel Class.

In determining the appropriate award of attorneys fees, the trial court is vested with discretionary authority to award fees based upon either a percentage of the award method or the lodestar method. *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill. 2d 235, 246 (1995). While the typical contingent fee is between 33 and 40 percent, many courts dealing with multimillion dollar class action awards recognize 25 percent as a benchmark figure for contingent fee awards. *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (*citing In re Coordinated pretrial Proceedings*, 109 F.3d 602, 607 (9th Cir. 1997); *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991).

Thus, with respect to the percentage of the award analysis, the treatment of the "spillover" funds is critical. Were the trial court to exclude the estimated $49 million in spillover funds, they would have awarded $19 million in attorneys fees on $38

million in new money, $5 million of which will go to administration of the settlement. This would result in class counsel receiving 57.5% of the net award to the plaintiffs, a figure that would clearly be too high. On the other hand, if the trial court includes the $49 million, as they did in this case, the $19 million in attorneys fees is only 23% of the net settlement. This percentage plainly falls within the flexible range of class action attorney fee awards. *See In re General Motors corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 822 (3d Cir. 1995).

The parties have cited no authority regarding the inclusion or exclusion of "spillover" funds from a public settlement into the fund of a private action settlement. The trial court was in the best position to judge the role of the plaintiffs' current action in influencing or assisting the attorney generals in the proceedings of the AG led litigation.

Further, while the $49 million is neither "new money" nor new liability for Aon, it will ultimately be distributed to the class members in this case as was specifically negotiated by class counsel. Thus, while the liability may have arisen via the AG Settlement, the negotiation for the distribution of the funds to the class members provides a benefit on which the attorneys in this case should be compensated.

Finally, we cannot ignore the fact that this litigation ultimately led to the reformation of the business practices of Aon, its entities, and its subsidiaries. While it is undoubtedly correct that, in the absence of this settlement, those business reforms would be enforceable through the AG Settlement, this court cannot accept the position that this litigation played no role in catalyzing the reform

of insurance brokerage practice. This litigation began long before any AG investigation. Whether it played a primary role or a minor role is something best suited for determination by the trial court.

We hold that the trial court did not err in considering both the $49 million spillover amount and the injunctive relief in the form of business practice reforms in awarding attorneys fees. Further, the attorneys fees as analyzed by the trial court under both the lodestar method and the amount-of-the-award method are reasonable.

X. Validity of the Settlement Contract

Objectors argue that, because there is a dispute as to how many Aon clients are members of the class, the settlement reached by Aon and the class is illusory. Objectors contend that Aon has "argued that the *Daniel* Settlement covers all 3.8 million policyholders who purchased insurance through Aon during the *Daniel* class period." Regardless of this assertion by the objectors, Aon apparently now agrees with the trial court's discussion of the class definition. As stated by the trial court, "the settlement class, as well as the class certified in July 2004, consists of policyholders where Aon received or was eligible to receive *any* consideration with the exception of 'fixed consideration based solely upon the actual amount charged by the insurers and for the insurance earned upon the commencement of insurance.'"

This argument is unique, but without merit. It is difficult for a third-party objector to contend that plaintiff class and defendants failed to have a "meeting of the minds" when both the plaintiff class and the defendants agree that there was a meeting

of the minds. Neither party to the settlement agreement disputes this definition. Accordingly, because the class definition was agreed upon by the parties, we hold that there was an adequate meeting of the minds and an enforceable settlement agreement.

XI. Standing: Signum, LLC

Signum, LLC, is in a unique position in this case. In its order dated November 1, 2005, the trial court held that Signum lacked standing to object to the Daniel Settlement. The trial court found that "Signum does not fall within the class definition certified by this Court in July 2004." Because the settlement would not release non-class members claims, Signum failed to show that the settlement would cause any concrete injury or encroach upon any legally protected interest.

Upon Signum's motion to reconsider, the trial court clarified its position. In its ruling on the motion, and based upon representations of class counsel, Signum was not a part of the class because "the Aon subsidiary that obtained insurance for Signum did not receive and was not eligible to receive consideration in the form of a bonus, commission or profit sharing." The trial court recognized that the class consisted of "policyholders where Aon received or was eligible to receive any consideration with the exception of "fixed consideration based solely upon the actual amount changed by the insurer and for the insurance and carried upon the commencement of the insurance." Because Aon did not receive any improper consideration from an insurer from its sale of Signum's policy, Signum does not fall within the class definition.

Signum's argument appears to be motivated, at least in part, by its wish to maintain a separate class action against Aon and its subsidiaries. Signum specifically requested that the trial court find that Aon should be judicially estopped from asserting that other similarly situated policyholders are members of the class. The trial court declined to extend its holding beyond Signum and this court will not second guess the trial court's decision. If Signum desires a separate class action on behalf of similarly situated policyholders, it may maintain one. It is possible that the class definition approved by the trial court will preclude many policyholders from being a class member in a Signum-led class actions; however, it is neither the trial court's, nor this court's responsibility to determine each individual policy holder's ability to partake in a Signum-led class action. As such, we affirm the trial court's holding that Signum is not a class member and lacks standing in this case.

XII. Definition of Settlement "Class"

Various objectors make arguments regarding the definition of the class contained in the settlement agreement. One objector argues that the alteration of the definition of "contingent commission" impermissibly broadens the class definition and is inconsistent with the definition of the class originally certified in July of 2004. Objectors are primarily concerned with the change from "obtaining anything else of material value *for* the insurer" to "obtaining anything else of material value *from* the insurer." (Emphasis added).

This argument lacks merit. In its order dated December 1, 2005, the trial court confirmed that changing one word merely provided a more accurate

description of how the contingent commission contracts operated. We agree. If Aon received fixed consideration based solely on a percentage of the price of the written policy, that consideration is excluded from this case. Everything else is included. Changing one word from "for" to "from" does not constitute grounds to reject this settlement.

For all of the reasons stated, we therefore affirm the judgment of the trial court.

Affirmed.

CAMPBELL, J., with NEVILLE, P.J., and MURPHY, J., concurring.

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT – CHANCERY DIVISION

ALAN S. DANIEL and WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, on behalf of themselves and all other persons similarly situated,	)	
Plaintiffs,	)	Case No. 99 CH 11893
v.	)	Class Action
AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AFFINITY INSURANCE SERVICES, INC., K&K INSURANCE SPECIALTIES, INC., K&K INSURANCE GROUP, INC. (d/b/a K&K INSURANCE AGENCY, INC.),	)	Judge Julia M. Nowicki
Defendants.	)	

CLASS PLAINTIFFS' AND AON DEFENDANTS' JOINT PROPOSED ORDER AND FINAL JUDGMENT APPROVING THE CLASS ACTION SETTLEMENT

1. After considering the Agreement of Class Action Settlement dated March 9, 2005, as amended, and after considering all of the arguments, briefs, and evidence presented by the parties and objectors, the Court finds that the proposed Settlement is fair, reasonable, and in the best interests of Class Members and enters final approval of the Settlement. The Court, being fully advised in the premises, **HEREBY ORDERS, ADJUDGES, AND DECREES THAT:**

2. This Court has jurisdiction for settlement purposes over all claims of all Class Members as asserted in Plaintiffs' Corrected Third Amended Class Action Complaint. Likewise, this Court has jurisdiction over all Class Members. The Class is defined as follows:

> All U.S, Policyholder Clients who directly or indirectly employed the services of a direct or indirect subsidiary of Aon to place, renew, consult on or service insurance or other similar risk solutions products between January 1, 1994 and December 31, 2004, wherein Aon received or was eligible to receive Contingent Commissions, including consideration in the form of a bonus, commission or profit sharing (other than fixed consideration based solely upon the actual amount charged by the insurer for the insurance and earned upon the commencement of the insurance).

3. A list of the Class Members who properly and timely excluded themselves from the Class is attached to this Order and Final Judgment as Exhibit A.

4. The best notice practicable under the circumstances having been provided to Class Members and full opportunity having been offered to them to participate in the hearings and proceedings before this Court, it is hereby determined that all Class Members who did not timely elect to be excluded from the Class are bound by this Order and Final Judgment.

5. The Court finds that the requirements of 735 ILCS 5/2-801 are satisfied for the purposes of this Settlement for the reasons set forth in the Court's July 28, 2004 Memorandum Opinion and Order and November 1,2004 Memorandum Order and Opinion.

6. As explained in the Court's March 30, 2006 Memorandum Opinion and Order, in assessing the fairness and reasonable of the proposed Settlement, the Court considered the present benefits offered by the Settlement as compared with the likely eventual rewards of further litigation, as well as the fact that this case raised substantial, complex, and contested issues of law and fact. This Court finds that the Settlement represents a fair compromise between the competing interests of Class Members and Aon. The objections, including those from objectors who later opted out of the Class, have been carefully considered and are all overruled. The Court is convinced that on balance this settlement is fair, reasonable, and adequate and is in the best interest of Class Members. The Agreement of Class Action Settlement is accordingly approved,

and the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement of Class Action Settlement, as amended.

7. In approving the Settlement as amended, the Court also finds that, as to the claims that have been settled and dismissed pursuant to this Order and Final Judgment, class counsel is entitled to an award of fees in the amount of $19 million and reimbursement of expenses advanced in the prosecution of this case in the amount of $238,597.29, as described in the March 30, 2006 Memorandum Opinion and Order, to be paid from the Daniel Settlement Fund pursuant to the Settlement Agreement. The Court further orders that each party and objector shall bear its own litigation expenses, subject to this paragraph.

8. Pursuant to Supreme Court Rule 304(a), this Litigation, as defined in the Settlement, as to the Class Members and all claims raised by them, is hereby dismissed with prejudice and without further costs, and there is no just reason for delaying either enforcement or appeal or both.

9. Without affecting the finality of this Order and Final Judgment, the Court shall retain continuing jurisdiction over this case and the parties, including all members of the Class, to supervise the implementation, execution, enforcement, construction, and interpretation of the Agreement of Class Action Settlement.

10. All Class Members are enjoined from commencing or prosecuting any actions asserting any of the claims released by the Agreement of Class Action Settlement.

ENTERED

ENTERED
JUDGE JULIA M.
NOWICKI-0293
APR 18 2008
DOROTHY BROWN
CLERK OF THE
CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Julia M. Nowicki
Circuit Court Judge

Dated: April _____, 2006

APPENDIX E

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT
CHANCERY DIVISION

ALAN S. DANIEL and WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, on behalf of themselves and All other persons similarly situated,	)	No. 99 CH 11893
Plaintiffs,	)	Judge Julia M. Nowicki
v.	)	
AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AFFINITY INSURANCE SERVICES, INC., K&K INSURANCE SPECIALTIES, INC., K&K INSURANCE GROUP, INC. (d/b/a K&K INSURANCE AGENCY, INC.),	)	ENTERED Judge Julia M. Nowicki – 0293 APR 18 2006 DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK
Defendants.	)	

CORRECTED MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the joint motion of the Class Representatives and the Settlement Class for Final Approval of the Class Action Settlement Agreement. Also before the Court are the Joint Motion of plaintiffs and Aon to Strike, the Motions of North American Van Lines, Inc. and Allied Van Lines, Inc for Leave to File Documents and for Leave to Supplement the Record in Opposition to Proposed Class Action Settlement, and Dale Johnson Trucking's Proposed Modification of the Release.

Background

Plaintiffs filed their class action complaint alleging a scheme whereby Aon designed, implemented, supervised and enforced a policy in which Aon and its subsidiaries and agents collected undisclosed contingent commissions from their policyholders. Plaintiffs bring claims against Aon for breach of fiduciary duty and/or abuse of a confidential relationship and conspiracy to breach a fiduciary duty. Plaintiffs have chosen a constructive trust theory to define their measure of recovery and assert that the plaintiffs' recovery is properly measured by the disgorgement of profits retained by the Aon entities. This Court certified a nationwide class in this matter in July, 2004.

The Attorneys General of New York, Connecticut and Illinois, as well as the insurance authorities from New York and Illinois (the "Regulatory Agencies"), filed complaints against Aon in early 2005. Aon entered into a settlement agreement with the Regulatory Agencies for $190 million as well as

specified injunctive relief (the "Regulatory Settlement"). The parties in the instant case subsequently reached a settlement agreement in this case in March, 2005 and this Court granted preliminary approval of that agreement. The class plaintiffs and Aon agreed to a $38 million settlement, in addition to any overflow from the Regulatory Settlement, which the parties estimate will amount to $49 million, for a total settlement amount of $87 million. The parties also agreed to an injunction barring Aon from continuing to collect contingent commissions and other business practice reforms. The parties now seek final approval of their settlement agreement. This Court conducted a fairness hearing on final approval in December, 2005 and a supplemental fairness hearing in March, 2006.

Discussion

It is worthwhile to mention at the outset some of the unique features of this case. First, it appears that this lawsuit has been instrumental in reversing a long standing custom in the insurance brokerage industry, e.g., the collection of undisclosed commissions. One of the defenses asserted by Aon is that the collection of undisclosed commissions has been a common practice accepted by the community and, by implication, approved by the various state regulators. This litigation exposed this business practice as deceptive. The various attorneys general have now made it clear that the formerly, "accepted" practice of collecting undisclosed commissions is not permitted by state authorities. As such, the injunctive relief obtained as a part of the settlement of this lawsuit, which prohibits that practice, is significant.

Unlike many consumer class actions where the amount received by individual class members is quite small, a distinctive characteristic of this lawsuit is, the sizeable recovery for many of the class members. Thus, this class action presents an ideal situation for absent class members to opt out because it is economically feasible for them to proceed with their own action without any prejudice to losing the benefits of a class action.

Finally, while the objectors have strenuously argued the unfairness of this settlement, not one of them has come close to grappling with the undeniable fact that had this matter gone to trial, the likelihood of a plaintiffs' victory was somewhat questionable on a class action basis. The Court admonished plaintiffs early and often (and in fact, tried to convince the parties to consider an injunction only settlement early in the case) that the Court was skeptical of plaintiffs' ability to prove its claims on behalf of the class. The hurdles that plaintiffs faced in this case were immense. The record is well documented with arguments made by Aon that Aon was certain would be favorably received by the courts of review. Nevertheless, plaintiffs were successful in extracting $87 million from Aon, as well as injunctive relief, on what Aon termed a worthless case. Further proof of the adequacy of this settlement is the negligible number of opt outs.

Fairness and Reasonableness

Pursuant to 735 ILCS 5/2-806, a settlement agreement in a class action must be approved by the court in its sound discretion. A court must evaluate whether a settlement agreement is "fair and reasonable and in the best interest of all who will be

affected by it." *GMAC Mortgage Corp. of PA v. Stapleton*, 236 Ill. App. 3d 486, 493 (1st Dist. 1992).

Several factors are relevant in determining whether a settlement is fair and reasonable, including (1) the strength of the plaintiff's case on the merits, (2) the defendant's ability to pay, (3) the complexity, length and expense of further litigation, (4) the amount of opposition to the settlement, (5) the presence/absence of collusion in reaching the settlement, (6) the reaction of members of the class to the settlement, (7) the opinion of competent counsel, and (8) the stage of the proceedings and the amount of discovery completed. *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 971-72 (1st Dist. 1990).

The first factor, the strength of the plaintiffs' case on the merits, is the most significant factor in evaluating the fairness of a settlement. *Steinberg v. System Software Associates, Inc.*, 306 Ill. App. 3d 157 (1st Dist. 1999). A court must balance "the amount of the proposed settlement and the immediacy of a prospective recovery for Class Members against the continuing risks of litigation." *Korshak*, 206 Ill. App. 3d at 972. Plaintiffs and Aon argue that there is a significant risk to continued litigation in this case, despite the Court's certification of the class. Aon maintains that there are compelling arguments questioning the propriety of class certification that it would raise on appeal should this litigation continue as well as a number of defenses Aon would present at trial.

As to the appropriate certification of a nationwide class, Aon made a number of arguments against certification prior to settlement, and if there is not a final approval will continue to make these

arguments. First, Aon argued that individualized issues prevail including whether a fiduciary duty exists; the scope and timing of any such fiduciary duty; the content of written contracts between class members and Aon; whether the written contracts were breached; whether an individual was subjected to the practices at issue; whether Contingent Commissions were disclosed and agreed upon by class members; whether Aon received or was eligible to receive Contingent Commissions in connection with Aon's provision of professional services to class members; differences in knowledge; differences in ratification, consent and voluntary payment; and differences in limitations periods.

Aon also believed that there are potential choice of law issues. Aon notes that in certifying a nationwide class, this Court recognized that the law of the 50 states will likely be applied for policyholders who have written contracts with Aon. Aon argued that the laws of all 50 states differ in a number of ways including (1) different standards for whether a fiduciary or confidential relationship exists; (2) different standards for whether Aon represents the insurer or insured; (3) different standards for whether there is a duty to disclose compensation or commissions like profit sharing; (4) different requirements for proof of damages and/or the remedy of a constructive trust; (5) different requirements for reliance; and (6) differences in statutes of limitation.

Finally, Aon questioned class certification based upon the knowledge class members possessed regarding Aon's receipt of contingent commissions. Aon submitted that some class members expressly agreed to contingent commissions in their written

contracts and that some class members were made aware of the contingent commissions through disclosures on fee agreements, invoices, Aon's website and since 1999, through the media. Moreover, Aon argued that the contingent commissions may not have been material to many class members.

Aon also intends to present evidence on ratification and the voluntary payment doctrine should this Court deny final approval of the settlement and this case proceed to trial. Pursuant to the law on ratification, when a plaintiff has knowledge of the facts and nevertheless accepts benefits for any considerable length of time, the plaintiff will have ratified the conduct from which those benefits came. *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 93-94 (1st Dist. 1999). Under the voluntary payment doctrine, "money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal." *Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 847 (1st Dist. 1995). Aon maintains that it is capable of submitting evidence to demonstrate that many class members continued to obtain insurance placement or other services through Aon even after learning of Aon's receipt of, or eligibility to receive, contingent commissions.

Aon further identifies several potential obstacles to plaintiffs succeeding at trial. Aon argues that even if a fiduciary duty did exist between plaintiffs and Aon, the general rule is that a fiduciary has no duty to disclose its compensation. *See Martin v. Heinold Commodities, Inc.*, 117 Ill.2d 67, 78 (1987). Aon also

argues that under Illinois law, class claims based on an alleged breach of fiduciary duty would be prohibited by the Insurance Placement Liability Act, which bars fiduciary duty-based claims against insurance producers. 735 ILCS 5/2-2201(b); *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 43 (1st Dist. 2005). Finally, Aon argues that the claims of earlier class members would be time-barred by the two year statute of limitations. 735 ILCS 5/13-214.4.

Against these difficulties plaintiffs must face in prevailing on the merits, this Court must weigh the benefits provided to the class under the proposed settlement. The settlement agreement provides significant value to class members. The total monetary benefits available to eligible class members in connection with the Daniel action includes the $38 million agreed to by the parties as well as the overflow from the Regulatory Settlement, which the parties estimate will amount to $49 million, for a total settlement amount of $87 million, less attorneys' fees and $5 million in administrative costs. In addition, the settlement provides that Aon will implement certain significant business reforms, including the prohibition of contingent compensation, alleged pay-to-play arrangements, alleged bid-rigging arrangements, reinsurance brokerage "leveraging," and inappropriate use of wholesalers. Aon win also implement mandated disclosures to clients related to quotes sought and received, company-wide written standards of conduct, and training on business ethics, professional obligations, conflicts of interest, anti-trust and trade practices compliance, and record keeping. Some objectors believe that since these business reforms are required by the Regulatory Settlement, they provide no value to the settlement

in this case. However, plaintiffs and Aon note that their negotiations regarding such business reforms began before Aon entered into the Regulatory Settlement such that they are at least in part derived from the Daniel case. This Court need not make such a determination as it finds that even without the business reforms, the monetary benefits to the class outweigh the risk of continued litigation.

The second factor for the Court to consider is the defendants' ability to pay the agreed upon amount. In this case, Aon's counsel has represented the ability to provide the relief settled upon.

The third factor is the complexity, length and expense of further litigation. At the time this case settled, the parties maintain that there was additional discovery that had yet to be completed. There were a number of outstanding subpoenas for documents as well as notices for depositions of Aon employees. Aon maintains that it would pursue an appeal of class certification as well as any adverse decision after a trial in this matter. In fact, Aon's Rule 308 motion to certify this Court's certification of a nationwide class was fully briefed and pending before the Court immediately prior to the parties reaching a settlement agreement. As such, without this settlement agreement, ultimate resolution of this case would be years away. Given the lengthy and costly litigation that remains in this case and the complex nature of the claims made, this Court finds that the risk of further litigation would diminish any potential remedy to plaintiffs and weighs in favor of approval.

The fourth factor is the amount of opposition to the settlement. In a class of approximately 1.5 million, only fifty objections have been filed, many of

which were withdrawn. Only nine objections, on behalf of approximately eighteen objectors, were presented at the initial fairness hearing. In addition, there were a handful of other objectors who submitted their arguments through briefing alone. This Court notes that ultimately, the only objection that this Court believes has merit is that regarding notice, which resulted in the January 2006 notice. As such, this Court finds that the amount of opposition to the settlement is minimal and weighs in favor of approval.

The fifth factor before the Court is the presence or absence of collusion in reaching the settlement. Both plaintiffs and Aon assert that the parties' negotiations were made at arms length. This case was litigated for five and a half years before the parties reached a settlement, with repeated motions to dismiss, motions for summary judgment and a motion for class certification. No evidence of collusion has been presented to this Court. Therefore, the Court finds that the absence of collusion also weighs in favor of approval of the settlement.

The sixth factor for the Court to consider is the reaction of members of the class to the settlement. Overwhelming support by class members is strong evidence supporting the fairness of a class settlement. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 226-27 (S.D. Ill. 2001). At the time of the additional notice and opportunity to opt out in January 2006, less than 500 opt outs had been received. Given the large size of the class, which includes approximately 1.5 million members, these opt outs make up only a small portion of the class. And in this case, as alluded to earlier, given the

significant recovery of many class members, it is economically feasible for those absent class members to opt out of the settlement and pursue independent claims. Further, this Court notes that there were several large and sophisticated corporations, who were identified as class members that opted out after the November 2004 notice, yet opted back in to participate in the settlement benefits. These class members include American Airlines, Deere & Company, Exelon Corp., HSBC Finance Corp., Pacific Gas & Electric, Time Warner, Tribune Company, and USA Truck. This Court finds that such support by the class members weighs in favor of approval of the settlement.

The seventh factor to consider is the opinion of competent counsel. The experienced counsel for both plaintiffs and Aon consider this settlement to be fair, reasonable and in the best interest of all parties. It is important to note that this settlement was reached only after the parties vigorously litigated this case for well over five years before proceeding to arm's length settlement negotiations. *See Korshak*, 206 Ill. App. 3d at 974. As such, this Court finds that counsels' favorable opinion of the settlement agreement weighs in favor of approval.

The final factor to consider is the stage of the proceedings and the amount of discovery completed. "The stage of proceedings at which settlement is reached is important because it indicates the extent to which the trial court and counsel were able to evaluate the merits of the case and assess the reasonableness of the settlement." *Korshak*, 206 Ill. App. 3d at 974. This case has been heavily litigated for years, consisting of motions to dismiss, summary judgment motions and class certification. In the

context of this litigation, Aon has produced well over half a million pages of documents as well as the millions of records AlixPartners LLC gathered regarding contingent commission payments and used to develop and allocate the Daniel fund. In addition, some depositions, including the deposition of Meade Monger of AlixPartners, were completed. This Court finds that the discovery conducted between the parties and the evidence presented to the Court is sufficient to allow this Court to evaluate the fairness of the settlement.

Although this Court recognizes that there is always the possibility of a better settlement, "that is not the standard by which class action settlements should be measured. Rather,... [the] [c]ourt's role is limited to determining whether the Settlement is fair, reasonable, and adequate." *Mangone*, 206 F.R.D. at 227. Taking into consideration all of the factors discussed above, including the potential weaknesses of plaintiffs' case and the risk of further litigation, the defendants' stated ability to pay, the expense in continuing with the litigation, the relatively small amount of opposition to the settlement in connection with the overwhelming support of the class members and class action attorneys, the lack of evidence of collusion in reaching the settlement and the exchange of information between the parties, this Court finds that the proposed settlement agreement is fair and reasonable.

Objections

Although there has been comprehensive briefing and extended oral arguments regarding the objections made to this settlement, in the end, the objections fall within seven basic categories: (1) that

the notices did not provide an adequate opportunity to opt out or include sufficient information; (2) that the class definition is not "ascertainable;" (3) that the settlement consideration and benefits are inadequate; (4) that the release is overbroad; (5) that plaintiffs and their counsel cannot adequately represent the entire class; (6) the proposed class could not be certified in light of *Avery v. State Farm*; and (7) the requested attorneys fees were excessive.

(1) First, the objectors make several arguments with respect to the notices. The objectors argue that the notices were constitutionally deficient such that class members were not provided with adequate notice or with a meaningful opportunity to opt out. Three notices have been provided to the class members, a publication notice in November 2004, a direct mailing notice in June 2005, and a direct mailing notice in January 2006. The January 2006 notice provided class members with an unconditional opportunity to opt out or object to the settlement. After the January 2006 mailing, there has not been any serious objection to notice. Accordingly, the Court finds that these notices were more than sufficient under Due Process and applicable law. Therefore, objections as to the sufficiency of the notice are overruled.

Objectors also object to the content of the notices maintaining that they did not provide sufficient information for class members to decide whether to opt out or object to the class settlement, did not inform class members of a distribution plan, and failed to inform class members of the MDL litigation. It is not necessary that a notice provide "a complete source of settlement information." *Fischer v. Madway*, 485 A.2d 809, 811 (Pa. Super 1984). Aon

submitted the affidavit of Kinsella/Novak Communications Ltd ("KNC") stating that "the Notice effectively notified the Class about all of the important aspects of the Settlement." Kinsella Aff. ¶ 31. Moreover, the notice provided that class members could contact the settlement administrator, class counsel, or a website for further information. This Court finds such information to be sufficient and overrules the objections as to the content of the notices.

(2) Second, the objectors argue that the class is not ascertainable and policyholders cannot determine whether they are in the class. This Court has already found the class to be sufficiently identifiable when it granted class certification in July 2004. The Court again addressed the class definition, noting that it was sufficient, when it stated in its December 1, 2005 Opinion that the "settlement class, as well as the class certified in July 2004, consists of policyholders where Aon received or was eligible to receive *any* consideration with the exception of 'fixed consideration based solely upon the actual amount charged by the insurer and for the insurance and earned upon the commencement of the insurance.'" December 1, 2005 Opinion at 2. In addition, the various notices provided class members information on how to contact the settlement administrator, class counsel or a website if they needed further information. Therefore, objections that the class is not ascertainable are overruled.

(3) Third, the objectors dispute the value of the settlement and argue that the consideration and benefits of the settlement are inadequate. With respect to the value of the settlement, the objectors

argue that only $14 million will remain to be shared by the class after deducting attorneys fees and administration costs. The objectors do not believe that it is appropriate to credit the overflow from the Regulatory Settlement because the Attorneys General dispute that the Daniel plaintiffs contributed to the Regulatory Settlement. Further, if the Daniel settlement is not approved, the objectors argue that Aon will still be required to fully distribute the entire $190 million of the Regulatory Settlement to policyholders.

The Regulatory Settlement provides that any remaining funds must be used by Aon "to satisfy any pending or other claims asserted by policyholders relating to these matters." Aon and plaintiffs specifically negotiated, as a part of the Daniel settlement, that those funds remaining in the Regulatory Settlement will be used to satisfy the claims of the Daniel class. Since the overflow of these funds were specifically negotiated in the Daniel litigation, this Court will consider them in determining the value of this settlement.

Objectors further argue that the value of the injunctive relief, which Plaintiffs and Aon estimate at more than $30 million, should likewise not be considered because all of the injunctive relief is already a part of the Regulatory Settlement. However, the parties note that their negotiations regarding such business reforms began before Aon entered into the Regulatory Settlement such that they are at least in part derived from the Daniel case. Nevertheless, as discussed above, this Court finds that there is sufficient value to this settlement agreement even without consideration of the injunctive relief.

As to the adequacy of the settlement, the objectors argue that the settlement amount is inadequate in light of the claims released and the merits of plaintiffs' case. The claims sought to be released include those based on performing and non-performing contingent commission contracts. Thus, the objectors argue that the release should apply only to those policyholders who qualify for relief under the settlement. The objectors maintain that the compensation for services to underwriters for 2003 and 2004 alone is in excess of $550 million. The objectors further estimate that the challenged practices generated well over $1.5 billion of income to Aon during the class period. Because plaintiffs did not retain an expert to analyze the economic impact many of the challenged practices had on the price of insurance products, the objectors argue that the Court cannot fully determine the value of the claims and the adequacy of the settlement amount. Aon argues that the objectors' estimation assumes that contingent commissions have been a constant during the class period. Instead, Aon cites to the analysis of AlixPartners, which estimated that from 1994 to 2000 Aon collected approximately $362 million in contingent commissions and other compensation for services to underwriters.

"Dollar amounts are judged not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (S.D.N.Y. 1984). "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *City of Detroit v. Grinnell Corp.*, 495

F.2d 448, 455 (2d Cir. 1974). In this case, this Court finds that the benefits are well within the range of fairness. Class members from 2001 to 2004 will receive $190 million in compensation from the Regulatory Settlement, or will receive funds from the Daniel settlement if it would provide a larger payout. Class members from 1994 to 2000 will receive $38 million, less the administration costs and attorneys fees, as well as the estimated $49 million overflow from the Regulatory Settlement. Moreover, the earlier the claim, the stronger the statute of limitations argument. There could very well be a recovery of zero in this case. Class members who believe that the risks of recovery are a result of the class action being framed as a one size fits all case were absolutely free to opt out of the settlement. Again, as stated earlier, this class action presents an ideal situation for absent class members to opt out given that many claims are so large making it economically feasible for individual class members to proceed with their own action without any prejudice to losing the benefits of a class action.

The objectors' claims that policyholders could recover much more than the undisclosed contingent commissions collected by Aon are based on assumptions and speculation and do not provide a basis for rejecting the settlement. Moreover, the monetary benefits made available through this settlement are not intended to, and do not represent, a particular amount of contingent commissions that were received by Aon. Rather, the settlement is a compromise of numerous claims investigated and asserted by plaintiffs and that are covered by the release which is made a part of the settlement agreement. AlixPartners performed an independent review of Aon's available records to determine

revenues association with contingent commissions received by Aon. Although the objectors continue to argue that AlixPartners excluded revenue that should have been included in the analysis, the objectors have offered little proof to support this argument.

The objectors also argue that the settlement fails to provide certain class members any consideration for the release. Under *City of Chicago v. Waters*, 95 Ill. App. 3d 919 (1st Dist. 1981), the settlement must be fair to all class members. Since the settlement agreement and release covers any class member who purchased a policy wherein Aon was "eligible" to receive a contingent commission, the objectors argue that class members associated with non-performing cash contingent commission contracts and other contingent arrangements will likely have their claims released without consideration. In addition, any class member entitled to $25 or less will not receive any distribution. "It is the usual custom and practice in class action settlements to have a similar threshold below which checks will not be issued, because the administrative cost of doing so exceeds the benefit." *In re American Family Enters.*, 256 B.R. 377, 426 (D.N.J. 2000). The compromise that the parties reached provides monetary as well as non-monetary relief to class members. Plaintiffs and Aon offered to remove the $25 threshold but the objectors asked that it remain. This Court finds no reason why the threshold would render the settlement unfair, especially considering the predominant characteristic of all plaintiffs.

The objectors argue that the burden for paying the administrative costs and attorneys fees has been shifted from the Regulatory Settlement to the Daniel

settlement. This disproportionately burdens the Daniel class that is not eligible to participate in the Regulatory Settlement. However, Aon has asserted that the $5 million in administration costs does not include Aon's costs to administer the Regulatory Settlement. In fact, the Regulatory Settlement requires Aon to bear the administrative costs of that settlement. Therefore, this Court finds no disparate treatment of some class members.

The objectors finally argue that there is no justification for the named plaintiffs to each receive $10,000. Courts routinely award "incentive payments" to class representatives. *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497 (1st Dist.1992). Three factors may be considered in reviewing the appropriateness of such incentive payments, which include "(1) the actions taken by the class representatives to protect the interests of class members and others; (2) whether those actions resulted in substantial benefit to the class members; and (3) the amount of time and effort spent by the class representatives in pursuing the litigation." *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F.Supp. 1226, 1266 (N.D. Ill. 1993). The named plaintiffs, through this class action, have sought to protect the interests of the class by putting a stop to Aon's practice of collecting undisclosed contingent commissions. In addition, class counsel has indicated that the named plaintiffs have spent a considerable amount of time contributing to this litigation by providing historical facts and necessary documents, reviewing pleadings, responding to motions, appearing for depositions, responding to discovery requests and discussing litigation strategy. Finally, it should be noted that the input and participation in the litigation has resulted in a settlement in the

approximate amount of $87 million. Therefore, this Court finds the $10,000 agreed upon for the named plaintiffs renders this settlement fair and reasonable.

As discussed above, the class would face a number of affirmative defenses at trial, including consent, voluntary payment, ratification and statute of limitations as well as appeals challenging the nationwide class certification. The class would not obtain any potential recovery for a number of years, assuming that judgment is eventually entered in their favor. The settlement provides certain benefits to the class now rather than questionable benefits to the class years from now. Once again, should class members, including the objectors, feel that they can obtain better results, they have been given sufficient opportunities to opt out of the settlement. Therefore, this Court overrules the objections pertaining to the inadequacy of settlement benefits.

(4) Fourth, the objectors argue that the release is overly broad. The objectors maintain that it is unfair to release the claims of policyholders whose policies were tied to the many other forms of remuneration that improperly benefited Aon, other than contingent commissions. Broad class action releases are common and appropriate and may settle all claims related to the same core facts as the class litigation, including claims that were not actually pled or litigated in the case. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106 (2d Cir. 2005). Moreover, any class member who disagrees with the scope of the release has been given ample opportunity to opt out of the class. Therefore, the objections pertaining to the release are overruled.

(5) Fifth, the objectors argue that the named plaintiffs are not adequate because the settlement agreement creates a conflict between plaintiffs and other class members. The objectors divide the class into two segments, those class members who purchased insurance between January 1, 2001 and December 31, 2004 (the "later purchasers") and those class members who purchased insurance between January 1, 1994 and December 31,2000 (the "earlier purchasers") The later purchasers may also participate in the Regulatory Settlement while the earlier purchasers will only participate in the Daniel settlement. The objectors argue that the amount of monetary relief available to the earlier purchasers depends on the amount claimed by the later purchasers in the Regulatory Settlement. Further, the Regulatory Settlement provides that any amounts of the $190 million that are not distributed by October 1, 2007 are to be reallocated on a pro-rata basis to the policyholders that participated in the Regulatory Settlement. As such, the objectors argue that the overflow from the Regulatory Settlement actually occurs at the expense of class members who elected to participate in the Regulatory Settlement. The objectors cite to *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), where the Supreme Court addressed such a conflict by affirming the appellate court's decision to decertify the class. In that case, a conflict existed between class members who were already injured by asbestos and class members who were only exposed to asbestos and may become injured as a result. *Id.* Each group of class members sought to maximize their payment. *Id.*

Plaintiffs and Aon argue that the distribution formula for the Daniel settlement is identical for all

class members and that those class members who participate in the Regulatory Settlement will not be allowed a double recovery. Rather, those members who participate in the Regulatory Settlement will receive additional payments under the Daniel settlement only if the amount they would be entitled to under the Daniel settlement exceeds what they received under the Regulatory Settlement. In such a situation, the class members who participated in the Regulatory Settlement will receive the difference from the Daniel settlement. Since all Daniel class members share a common interest in maximizing their recovery by obtaining as much as possible from the Regulatory Settlement, there are no divergent interests as there were in *Amchem*. 521 U.S. 591. Therefore, this Court overrules any objection pertaining to the adequacy of the named plaintiffs.

(6) Sixth, the objectors argue that the proposed class cannot be maintained after the Illinois Supreme Court's decision in *Avery v. State Farm*, 216 Ill.2d 100 (2005). In that case, the court decertified a nationwide class action because variations in the state laws precluded a finding of predominance. This Court has already noted that maintaining a nationwide class may require the creation of subclasses. Although this Court recognizes the possibility that the subclasses could become unmanageable, there has been no indication up to this point that such subclasses would in fact be unmanageable. Therefore, this Court overrules the objections to the certification of a nationwide class.

(7) Finally, the objectors argue that the requested attorneys fees are excessive. Plaintiffs' counsel have requested attorneys fees in the amount of $19 million. The objectors argue that Aon and plaintiffs

misrepresented to this Court that the Daniel litigation substantially contributed to the Regulatory Settlement, yet the Attorneys General of New York, Connecticut and Illinois, as well as each state's Insurance Regulator, state that the Daniel litigation had little or no impact on the Regulatory Settlement. Therefore, the objectors argue that plaintiffs' fee should only be considered in light of the $38 million Daniel settlement. However, as discussed above, plaintiffs and Aon specifically negotiated for the overflow from the Regulatory Settlement. Thus, this Court overrules any objection of excessive attorneys fees and awards an appropriate fee of $19 million as discussed below.

This Court has fully considered and overrules all other objections raised either by brief or at the fairness hearing on this matter.

Award of Attorneys Fees

Plaintiffs' counsel seek approval of a $19 million fee, which was agreed upon by plaintiffs and Aon, and request reimbursement of expenses in the amount of $238,597.29. The amount of the award of attorneys fees in a class action case is primarily within the discretion of this Court. *Leader v. Cullerton*, 62 Ill.2d 483, 488 (1976). Nevertheless, the Court must present sufficient justification when reducing a fee agreed upon by the parties and supported by plaintiffs' petition. *See Board of Commissioners of the Bolingbrook Park District v. County of Will*, 154 Ill. App. 3d 395, 398-400 (3d Dist. 1987). The Court is also vested with the discretionary authority to choose the percentage of the recovery method or the lodestar method to determine the amount of fees for plaintiffs' counsel. *Brundidge v. Glendale Fed. Bank*, 168 Ill.2d 235,

243-44 (1995). The Court has a special duty to ensure that these fees have been earned, are properly documented, do not represent duplication of effort and are reasonable.

Under the lodestar method, "[w]hen the court has determined the number of hours which benefit the class, it must then value the services by fixing a reasonable hourly rate for each attorney, taking into account the nature of the services performed, the complexity of the undertaking and the hourly fee charged for similar services by attorneys with similar skills and qualifications.... The appropriate hourly rates are then multiplied by the hours expended." *Langendorf v. Irving Trust Co.*, 244 Ill. App. 3d 70, 80 (1st Dist. 1992). This lodestar computation "may be adjusted by a weighted multiplier to account for the contingent nature of the undertaking and the benefits conferred upon the class." *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 922-23 (1st Dist. 1995). Under the percentage of recovery method, attorneys fees are determined as a reasonable percentage of the benefits achieved on behalf of Class Members, equal to approximately one-third the total recovery. *Ryan v, City of Chicago*, 274 Ill. App. 3d 913 (1st Dist. 1995). "The percentage will be based on the net settlement fund after deducting the costs of litigation." *Ikon Office Solutions, Inc. v. Stuart*, 194 F.R.D. 166, 193 (E.D. Pa. 2000). The percentage of recovery method is the preferred theory of computation. *Ryan*, 274 Ill. App. 3d at 922.

Aside from plaintiffs' petition and supporting documentation and the parties' agreement upon the award of fees, had the Court been given the task of determining attorneys fees, it would have

undertaken a slightly different calculation than that of plaintiffs. As discussed above, this Court rejects the argument of the objectors that only the $38 million should be considered when determining fees. Rather, plaintiffs and Aon specifically negotiated for the overflow from the Regulatory Settlement such that the settlement amount in this case is approximately $87 million in addition to the significant injunctive relief. Under the lodestar method, the total hours benefiting the class amount to 13,709.32. As supported by affidavit, at the various hourly rates, the lodestar computation amounts to $5,703,574.90. It is at this point that the Court's calculation would differ from that of plaintiffs. Plaintiffs request that this Court adjust the lodestar computation by a multiplier of 3.33, providing sufficient authority to support such a multiplier. The Court would have adjusted the lodestar computation by a multiplier of 3.0 to result in a fee of approximately $17 million. Under the percentage of the recovery method, after subtracting the administration costs of $5 million as well as plaintiffs' expenses of $238,597.29, there remains a net settlement fund of $81,761,402.71. A $17 million award of attorneys fee would amount to approximately 21% of the net settlement fund. This award would leave approximately $64.6 million to be disbursed to the class such that the $17 million award would make up approximately 26% of the class recovery.

Under plaintiffs' calculations, as noted above, the lodestar calculation would be adjusted by a multiplier of 3.33 to result in a fee of $19 million. This Court finds that there is little basis in law to distinguish between a multiplier of 3.0 and plaintiffs' multiplier of 3.33, especially since plaintiffs'

multiplier is well supported by caselaw. Moreover, a fee of $19 million would amount to approximately 23% of the net settlement fund. This percentage is well within a fair and reasonable percentage of the recovery, especially when considered in connection with the significant injunctive relief. *See Ryan*, 274 Ill. App. 3d at 926. Therefore, this Court finds that plaintiffs' requested fee of $19 million is fair and reasonable and finds no sufficient justification to reduce it.

Accordingly, this Court approves an award of $19 million in attorneys fees.

Joint Motion to Strike

On February 28, 2006, objector Dale Johnson Trucking filed its Submission of Expert Reports in support of its objection relating to the settlement release. In response, plaintiffs and Aon filed a joint motion to strike the submission as untimely.

On October 11, 2005, this Court ordered the objectors to identify any experts by October 14, 2005. Dale Johnson did not disclose any experts at that time. Dale Johnson also did not raise any expert opinion or report at the December 6 and 7, 2005 fairness hearing. When this Court set the March 7, 2006 supplemental fairness hearing, it did so to give any new objectors the opportunity to raise objections that were not already before the Court. The submission by Dale Johnson is not by a new objector and raises matters that it had already brought before the Court. Moreover, to allow this submission without a cohesive argument as to its import would be prejudicial. As such, this Court finds that Dale Johnson had ample opportunity to disclose its expert and submit its expert reports prior to the December

6 and 7 fairness hearing. Therefore, this Court grants the motion of plaintiffs and Aon to strike Dale Johnson's Submission of Expert Reports.

Proposed Modification of the Release

Objector Dale Johnson Trucking also filed a proposed modification of the release in this case. Dale Johnson requests that this Court specifically carve out federal RICO and federal antitrust claims from the release. According to Dale Johnson, such a modification of the release is supported by the value of the RICO and federal antitrust claims that will ultimately be released by this settlement agreement. However, Dale Johnson has not provided this Court with any evidence as to the value of such claims. Moreover, all class members were given sufficient opportunity to opt out of the settlement should they find the settlement to be inadequate to compensate the released claims. Therefore, this Court denies the request of Dale Johnson to modify the release in this case.

Motions for Leave to File Documents and to Supplement the Record

The objectors North American Van Lines, Inc. and Allied Van Lines, Inc. have filed two motions for leave to file certain documents in opposition to the settlement. These objectors fail to provide a cohesive argument that these documents were not considered in Mr. Monger's calculations or how these documents would impact this Court's approval of a settlement on behalf of the entire class. Moreover, since these documents were not submitted prior to either the fairness hearing or the supplemental fairness hearing, neither plaintiffs nor Aon were provided with the opportunity to provide evidence in response

to these documents, which Aon submits may have included an affidavit from Mr. Monger. As such, this Court finds that the submission of these documents would be prejudicial. Moreover, North American Van Lines, Inc. and Allied Van Lines, Inc. have been given ample opportunity to opt out of the settlement should they find it to be insufficient. Therefore, the objectors' two motions for leave to file documents are denied.

North American Van Lines, Inc. and Allied Van Lines, Inc. also refer to a motion filed on November 30, 2005 that they believe was never addressed by the Court. The November 30, 2005 submission is entitled Designation and Deposit of Documents and Trial Exhibits by North American Van Lines, Inc. and Allied Van Lines, Inc. (Objectors) For Use At Fairness Hearing And For Other Purposes. That document does not request this Court for any relief and therefore, none is given.

Conclusion

This Court finds that the proposed settlement agreement is fair and reasonable and overrules the objections to the settlement. In addition, this Court awards attorneys fees in the amount of $19 million. The Joint Motion of plaintiffs and Aon to Strike is granted. The Motions of North American Van Lines, Inc. and Allied Van Lines, Inc for Leave to File Documents and for Leave to Supplement the Record in Opposition to Proposed Class Action Settlement and Dale Johnson Trucking's Proposed Modification of the Release are all denied.

Entered:

s/ Julia M. Nowicki
Julia M. Nowicki
Circuit Judge
Dated: April 18, 2006

APPENDIX F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

ALAN S. DANIEL and WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, on behalf of themselves and All other persons similarly situated,	)	
Plaintiffs,	)	No. 99 CH 11893
v.	)	
AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AFFINITY INSURANCE SERVICES, INC., K&K INSURANCE SPECIALTIES, INC., K&K INSURANCE GROUP, INC. (d/b/a K&K INSURANCE AGENCY, INC.),	)	Judge Julia M. Nowicki
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the defendants Motion for Reconsideration and Stay or, in the Alternative, to Certify Questions for Appeal as well as plaintiffs' Motion to Approve the Form of Publication Notice.

Motion to Reconsider

This Court previously certified a nationwide class on Counts I and II with respect to the three named Aon entities, Aon Corporation, Aon Group, Inc., and Aon Services Group, Inc. on July 28, 2004. The Aon defendants now bring this motion to reconsider various portions of this Court's certification opinion.

Defendants argue that there are at least two groups of plaintiffs, one whose claims call for a conflicts analysis pursuant to § 145 of the Restatement (Second) of Conflict of Laws and one whose claims are based in contract requiring a conflicts analysis pursuant to § 188 of the Restatement (Second) of Conflict of Laws. As to the tort plaintiffs, defendants assert that pursuant to Section 145, the place of the plaintiffs' injuries, based on the residency of each plaintiff, is all 50 states. Similarly, as to those plaintiffs whose relationship is governed by a contract, defendants argue that the contracts may contain a choice of law provision or that pursuant to Section 188, the law of all 50 states would apply. Thus, defendants argue that this Court is required to conduct a 50 state conflicts of law analysis in addition to determining the existence of significant contacts of Illinois with plaintiffs' claims. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Defendants further argue that

under the first part of the *Shutts* analysis, this Court must look to the differing laws relating to fiduciary duty. Defendants point to 18 states in which there is a conflict in the laws pertaining to fiduciary duty and argue that these differing laws preclude the application of Illinois law and necessitates that the law of each State apply respectively. Defendants also note that Section 388 of the Restatement (Second) of Agency, relied upon by plaintiffs, has been formally adopted in only one or two states and as such, should not be applied to plaintiffs' claims. Defendants further argue that Illinois lacks significant contacts with plaintiffs' claims precluding certification of a nationwide class action in Illinois pursuant to the second part of the *Shutts* analysis.

On the other hand, plaintiffs argue that Section 145 governs the conflicts analysis as to all plaintiffs. Plaintiffs assert that pursuant to Section 145, the place of plaintiffs' injuries is Illinois because the retention of kickbacks occurred in Illinois and because the conduct causing the injury, namely the scheme of receiving kickbacks, occurred in Illinois. As such, plaintiffs argue that a 50 state conflicts of law analysis is not required. Further, plaintiffs argue that the court in *Martin v. Heinold*, 117 Ill.2d 67, 510 N.E.2d 840 (1987) did not conduct such an analysis. Thus, plaintiffs argue that this Court is only required to conduct the second part of the *Shutts* analysis to determine the existence of significant contacts. 472 U.S. 797. In the alternative, the plaintiffs rely on Section 388 of the Restatement (Second) of Agency to demonstrate that no conflict exists among the 50 states.

As a threshold matter, this Court must determine the appropriate conflicts analysis to make

in order to determine whether the plaintiffs' claims should be governed by Illinois substantive law. Although plaintiffs maintain that a contracts analysis is not necessary for any plaintiffs, this Court believes that it must look to the essence of each relationship at issue, which plaintiff alleges is a confidential relationship. Where contracts exist, the contract may or may not be needed to define the confidential relationship. If the contract is required, this Court must conclude pursuant to Section 188 that the law of all 50 states will apply to plaintiffs' claims and the Court will need to conduct an exhaustive analysis of the laws of the 50 states. However, as both parties admit, the existence of contracts and the content of those contracts is presently unknown. Therefore, after an analysis can be made of the return on the preliminary notice, this Court will determine if it must conduct an exhaustive analysis of the laws of the 50 states. It would be premature to predict what the results might be as the plaintiffs may change the class definition, the analysis may result in manageable subclasses or something unforeseen at this time may occur.

To the extent that the contracts are not necessary to define the parties' relationships or do not exist, this Court adopts its November 4, 2003 analysis made pursuant to Section 145 of the Restatement (Second) of Conflicts of Law. Inasmuch as the November 4, 2003 opinion contained an analysis pertaining to different parties, this Court must reconsider its analysis as it relates to these defendants. In so doing, this Court finds, consistent with its November 4, 2003 opinion (pp. 2-6) and its July 28, 2004 opinion (pp. 15-16), that the place of plaintiffs' injuries is Illinois and as such, Illinois law

may be properly applied. As this Court has previously found, plaintiffs' allegations that the scheme of receiving or being eligible to receive commissions/kickbacks was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois and the allegation that the commissions or undisclosed kickbacks were received in Illinois are sufficient to substantiate a finding that the place of injury is Illinois. Plaintiffs' allegations are further bolstered by their indication to the Court that the decision to terminate this practice of receiving commissions/kickbacks was unilaterally made in Illinois. It is difficult to ignore the many statements in the news media, including a full page advertisement by Aon representatives, wherein Aon purports to speak for all Aon entities and affiliates. These statements are made without any apparent difficulty in either speaking on their behalves or obtaining their assent with lightning speed. In addition, the Aon defendants are alleged to have their principal places of business in and operate their insurance brokerage business from Illinois.

The defendants have argued that the place of injury is where the individual plaintiffs suffered his/her/its loss. *See Ingersoll v. Klein*, 46 Ill.2d 42, 45, 262 N.E.2d 593 (1970). The Court agrees that the law normally places great weight on that factor. However, as stated previously, this case is not claiming damages to the plaintiffs in the ordinary sense, but rather claims the plaintiffs are entitled to his/her/its fair share of the disgorgement of undisclosed commissions. These commissions, plaintiffs assert, are in the control of the defendants located in Illinois. Since Illinois law properly applies, this Court need not engage in individual conflicts of

law analysis for the 50 states. *See Martin*, 117 Ill.2d 67.

Even if this Court were to decide that the place of injury was in fact the 50 individual states, the outcome would be the same. Defendants cite to authority from 18 states in which the breach of fiduciary duty laws are different and argue that these differences preclude the certification of a nationwide class. However, when "certain individual questions exist which may require individual determinations, these individual questions may be handled within subclasses, as long as the common issues predominate." *Purcell and Wardrope Chtd. v. The Hertz Corp.*, 175 Ill. App.3d 1069, 1075, 530 N.E.2d 994 (1st Dist. 1988). In *Purcell*, the court went on to hold that questions "concerning whether the laws of different States apply to the various transactions will not ordinarily prevent the certification of a class action proceeding." *Id.* If, at some later time, the presence of the subclasses becomes unmanageable, the court has the option to set aside the class certification or a portion of it. *Id.*

This Court notes that contrary to defendants' assertion, no court has flatly held that a fiduciary relationship never exists between an insured and its broker. Rather, several courts cited by defendants have held that a special relationship must exist between the parties in order to find a fiduciary relationship. *See Mans v. Peoples Bank of Imboden*, 10 S.W.3d 885 (Ark. 2000); *Paper Savers, Inc. v. Nacsa*, 59 Cal. Rptr. 2d 547 (Cal. Ct. App. 1996); *Court View Centre, LLC v. Witt*, 753 N.E.2d 75 (Ind. Ct. App. 2001); *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092 (Me. 1991); *Sadler v. Loomis Co.*, 776 A.2d 25 (Md. Ct. Spec. App. 2001); *Schwartz v.*

Travelers Indem. Co., 740 N.E.2d 1039 (Mass. App. Ctr. 2001); *Gabrielson v. Warnemunde*, 443 N.W.2d 460 (Minn. 1989); *Rawlings v. Fruhwirth*, 455 N.W.2d 574 (N.D. 1990); *Slovak v. Adams*, 753 N.E.2d 910 (Ohio Ct. App. 2001); *Booska v. Hubbard Ins. Agency, Inc.*, 627 A.2d 333 (Vt. 1993); *Gordon v. Spectrum, Inc.*, 981 P.2d 488 (Wyo. 1999). Other courts cited by defendants have similarly held that the existence of a fiduciary relationship depends on the particular facts of the case. *See Grossenbacher v. Patrons Mut. Ins. Co.*, 2000 Conn. Super. LEXIS 954 (Conn. Super. Ct. Apr. 10, 2000); *Macabio v. TIG Ins. Co.*, 955 P.2d 100 (Haw. 1998); *Bichelmeyer Meats v. Atlantic Ins. Co.*, 42 P.3d 1191 (Kan. Ct. App. 2001). Two courts cited by defendants have held that the insured's broker has a duty to follow the instructions of the insured. *See Phillips v. State Farm Mut. Ins. Co.*, 497 S.E.2d 325 (N.C. Ct. App. 1998) and *Tammell v. Prairie States Ins. Co.*, 473 N.W.2d 460 (S.D. 1991), while another court cited by defendants has declined to make any holding on the matter. *See Shaw v. PACC Health Plan, Inc.*, 881 P.12d 143 (Or. Ct. App. 1994). This Court finds these differences in the various state laws to be minimal and the common question of law predominates (namely whether Aon's having received or being eligible for receipt, without the consent of its clients, undisclosed commissions or "kickbacks" in connection with the placement of insurance, violates their fiduciary duty or constitutes an abuse of their confidential relationship). As such, these differences can be handled in subclasses. This Court notes, as the above discussion demonstrates, that further refinement based of the facts in this case will likely result in fewer than 18 states and any remaining

differences among the state laws can be handled in fewer subclasses.

Moreover, as this Court noted in its previous finding of a common question (July 28, 2004 Opinion, pp. 7-16), plaintiff's' claim is not only for breach of fiduciary duty but also for a breach of confidential relationship. Defendants have presented no facts which demonstrate any differences in the laws of the 50 States as they apply to a breach of confidential relationship.

Further, the Restatement (Second) of Agency demonstrates that the facts in this case will be dealt with uniformly. Section 388 provides that "an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal." The profit in this case is the same for each class member and pursuant to the unique nature of the plaintiffs' complaint, all such profits retained by and realized by the Illinois Aon entities that resulted from the scheme will be placed into a constructive trust. Thus, this Court finds that the laws of the 50 states will not preclude the certification of a nationwide class.

The second part of the *Shutts* analysis requires that a state "have a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class" to apply its law to the class action. *Shutts*, 472 U.S. at 821-22. In making this determination," an important element is the expectation of the parties." *Id.* at 822. The Aon defendants are alleged to have their principal places of business in Illinois and operated their insurance brokerage business from Illinois. Plaintiffs have also alleged that the scheme of receiving or being eligible to receive commissions/kickbacks was originated,

planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois and the undisclosed commissions or kickbacks were received in Illinois. To further support this claim, plaintiffs have pointed out to this Court that the decision to terminate this practice of receiving commissions/kickbacks was unilaterally made in Illinois without first consulting any of its alleged independent entities, as demonstrated by a full page letter appearing in a Chicago paper. This Court concludes that the pleadings in this matter clearly demonstrate that the parties were aware that they were dealing with an Aon entity from Illinois. Thus, the parties should have expected that Illinois law would govern any dispute arising out of the practice that originated in Illinois and was terminated from Illinois. Thus, this Court finds that Illinois has the requisite significant contacts with plaintiffs' claims satisfying the second half of the *Shutts* analysis. *See Shutts*, 472 U.S. at 821-22.

Accordingly, defendants' motion to reconsider is granted insofar as the above findings and denied in all other respects.

Motion to Approve Notice

Plaintiffs bring a Motion to Approve the Form of Publication Notice Together with Plaintiffs' Plan of Distribution. However, defendants argue that providing notice at this stage in the litigation is premature.

Illinois statute provides that "upon a determination that an action may be maintained as a class action, or at any time during the conduct of the action, the court in its discretion may order such notice that it deems necessary to protect the

interests of the class and the parties." 735 ILCS 5/2-803. Since this particular matter of preliminary notice has never been addressed by the Illinois courts, this Court finds guidance in the Federal Rules of Civil Procedure Rule 23(d)(2), which contains language similar to that in Section 803. Pursuant to Rule 23(d)(2), notice can be sent out prior to final class certification in order to determine whether the class action requirements will be satisfied. *See Bauman v. United States District Court*, 557 F.2d 650 (1977). This Court similarly finds that notice may be sent out at any time in the action in an effort to protect the interests of the class and allow class members to understand the status of this action and their respective rights.

Accordingly, this Court grants plaintiffs' motion and approves plaintiffs' publication notice. As presented, if the parties have any further refinements of the notice, they will be brought to the Court's attention by November 5, 2004. Further, after the parties have had opportunity to review this opinion, the Court will entertain any motions brought pursuant to Section 308. However, such a motion will not have any effect on the publication of notice. This Court continues to urge the parties to engage in settlement negotiations and at the parties' requests, will conduct pre-trial conferences to aid the parties in reaching an agreement.

ENTERED:

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JUDGE
JULIA M. NOWICKI - 293

Julia M. Nowicki
Circuit Court Judge
November 1, 2004

APPENDIX G

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

ALAN S. DANIEL and WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, on behalf of themselves and All other persons similarly situated,	)	
	)	No. 99 CH 11893
Plaintiffs,	)	
	)	Judge Julia M.
v.	)	Nowicki
	)	
AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AFFINITY INSURANCE SERVICES, INC., K&K INSURANCE SPECIALTIES, INC., K&K INSURANCE GROUP, INC. (d/b/a K&K INSURANCE AGENCY, INC.),	)	**ENTERED JUL 28 2004 JUDGE JULIA M. NOWICKI - 293**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the plaintiffs', Alan S. Daniel ("Daniel") and Williamson County Agricultural Association ("WCAA") (collectively, the "plaintiffs"), Motion for Nationwide Class Certification, pursuant to 735 ILCS 5/2-801, on their class claims articulated in Counts I and II of their Corrected Third Amended Complaint ("Amended Complaint" or "Am. Compl.").

I. INTRODUCTION

This class action lawsuit deals with the insurance brokerage industry and its practices. There appears to be no question that the insurance brokerage industry transacts an immense volume of business in the United States and that Aon Corporation ("Aon") is one of the largest insurance brokerage houses in the country. Thus, there is great potential for the everyday practices of Aon to have a direct or indirect effect on a vast number of individuals and entities. As such, this lawsuit presents an issue of public concern.

It addresses whether insurance brokers, who are charged with the task of selecting insurance for their clients, can do so without disclosing to their clients that they are receiving commissions for the procurement of certain policies. It is this conflict of interest which forms the basis of the plaintiffs' lawsuit. The plaintiffs maintain that the law should provide a remedy for this alleged breach of duty on the part of the defendants.

The plaintiffs have elected to file their lawsuit in the state of Illinois and have asked that Illinois law redress the alleged wrongs they have sustained. They allege a scheme whereby Aon designed,

implemented, supervised and enforced a policy that required that Aon subsidiaries and agents to not disclose commissions, and thus, to not disclose their conflicts of interest. The plaintiffs further allege that this scheme emanated from Illinois, at Aon headquarters, was enforced throughout the country through Aon's direct and indirect subsidiaries and agents, and that the fruits of the scheme were funneled back to Illinois.

During the course of this litigation, the Court has been apprised by the parties that this practice of procuring insurance without disclosing commissions is a nationwide, industry-wide practice. Thus, one might expect that each state could or should redress the wrongs in each individual state. This Court does not disagree that such a state-by-state analysis is a viable approach. However, this Court further notes that the plaintiffs' complaint articulates a particular theory of recovery that constitutes another valid and reasonable analysis by which the alleged wrongs sustained may be redressed. The plaintiffs have asserted that Illinois may serve to adequately and properly dispose of these issues, as pled, on a nationwide scale, and have cited to Illinois law to support this proposition. *See*, *Martin v. Heinold Commodities, Inc.*, 139 Ill. App. 3d 1049, 487 N.E.2d 1218 (1st Dist. 1992); *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 643 N.E.2d 734 (1987); *Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269, 746 N.E.2d 1242 (5th Dist. 2001).

Additionally, as noted above, the plaintiffs have been very selective in their choice of theory of recovery. Their lawsuit employs an uncommon perspective, as it does not incorporate as its foundation the out-of-pocket damages sustained by

each individual class member. Rather, the plaintiffs have chosen a constructive trust theory to form their measure of damages, and assert that the plaintiffs' damages are properly measured by the disgorgement of profits retained by the Aon entities. As stated prior, the plaintiffs assert that the scheme emanated from Illinois and the fruits of the scheme were realized in Illinois. The plaintiffs argue, and this Court cannot disagree, that the manner in which the complaint is pled in conjunction with the unique theory of recovery makes the choice of Illinois as the forum for resolution of this action all the more appropriate.

While it is natural and predictable that the defendants would resist a lawsuit of any kind in any forum state, this Court is of the opinion that the disposition of a nationwide class action in a single forum has advantages for them. More specifically, having these issues addressed and decided in a single forum and at a single time, rather than in the forums of fifty (50) states or by way of the filing of thousands and thousands of individual cases, has obvious benefits for the defendants. The following Memorandum Opinion and Order details the essential facts and addresses the pertinent arguments.

II. STATEMENT OF FACTS

Daniel is a self-employed independent life and health insurance agent, who obtained errors and omissions insurance through Affinity Insurance Services, Inc. ("Affinity"), an insurance brokerage subsidiary of the named Aon defendants ("Aon"). In actuality, the coverage was provided by Employers Reinsurance Corporation ("ERC"), which undertook 100% of the risk. ERC and Aon had agreed prior to

profit sharing, thus making Aon eligible to receive undisclosed commissions (or "kickbacks") from ERC on account of the insurance business Affinity placed with ERC.

The plaintiff, WCAA, is a not-for-profit Illinois corporation that sponsors and organizes county fairs and related activities. The defendant, K & K Insurance Group ("K&K"), also an insurance brokerage subsidiary of Aon, procured commercial liability insurance for WCAA from TIG Ins. Co. ("TIG") beginning in 1996. In 1993, TIG entered into a profit sharing agreement with K & K, whereby TIG agreed to pay commissions to K & K.

The plaintiffs complain that the practice of the defendants in receiving or being eligible to receive these commissions or "kickbacks," without the plaintiffs and other insureds' knowledge and consent and without having shared such commissions or "kickbacks" with its insureds, violates the defendants' fiduciary obligations to plaintiffs and other insureds, constitutes a violation of Illinois' consumer protection laws, and amounts to unjust enrichment, under the common law.

On June 23, 2003, this Court granted the plaintiffs leave to file a Third Amended Class Action Complaint. The plaintiffs' Amended Complaint contains five (5) counts as follows: (1) Count I – Breach of Fiduciary Duty and/or Abuse of Confidential Relationship and Inducement to Breach Fiduciary Duty or Abuse Confidential Relationship; (2) Count II – Conspiracy to Breach a Fiduciary Duty; (3) Count III – Violation of the Uniform Deceptive Trade Practices Act (815 ILCS 510/1, *et seq.*) (hereinafter referred to as the "UDTPA") (designated non-class); (4) Count IV – Violation of

the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1, *et seq.*) (hereinafter referred to as the "CFA") (designated non-class); and (5) Count V – Unjust Enrichment (designated non-class).

Following hearing on the defendants' § 2-619.1 Motion to Dismiss the plaintiffs' Third Amended Complaint, this Court, on November 4, 2003, entered its "Memorandum of Opinion and Order" ("November 4, 2003 Order"), which granted, in part, the defendants' Motion to Dismiss. More specifically, this Court ordered dismissal of Count III, pursuant to § 2-615, and denied the defendants' motion, with respect to Counts I, II, IV and V.

The plaintiffs now move for nationwide certification on Counts I and II (the only counts not expressly designated as "non-class" claims), with respect to the following proposed class:

> [a]ll persons in the U.S. who directly or indirectly employed the services of a direct or indirect subsidiary of the Aon Defendants to obtain insurance or other similar risk solutions products wherein such subsidiary received or was eligible to receive consideration in the form of a bonus, commission or profit sharing (other than fixed consideration based solely upon the actual amount charged by the insurer for the insurance and earned upon the commencement of the insurance) that was not disclosed to and agreed upon by the insured.[13] (Am. Compl., ¶ 31).

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[13] The proposed class definition of the Third Amended Complaint differs slightly from the proposed class definition of

III. STATUTORY REQUIREMENTS FOR CLASS CERTIFICATION

735 ILCS 5/2-801 provides the prerequisites necessary to bring a class action, as follows: "[a]n action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any question affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy."

735 ILCS 5/2-801.

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the Second Amended Complaint, which previously sought to articulate claims on behalf of the following class: "All persons in the U.S. who directly or indirectly employed the services of a broker who is a Defendant or a direct or indirect subsidiary of the Defendants to obtain insurance or other similar risk solutions products wherein such Defendant or subsidiary received or was eligible to receive consideration in the form of a bonus, commission or profit sharing (other than fixed consideration based solely upon the actual amount charged by the insurer for the insurance and earned upon the commencement of the insurance) that was not disclosed to and agreed upon by the insured." (Second Am. Compl., ¶ 31).

IV. DISCUSSION

"The named plaintiffs in a class action have the burden of establishing the statutory prerequisites, and the court must find the prerequisites present before it can sanction the maintenance of the suit as a class action." *Wheatley v. Board of Education*, 99 Ill. 2d 481, 486, 459 N.E.2d 1364 (1984); *People v. Weiszmann*, 185 Ill. App. 3d 273, 279-80, 541 N.E.2d 205 (2nd Dist. 1989).

* * * *

[UNRELATED PORTION OMITTED]

B. Whether There Exists Questions of Fact or Law Common to the Class, Which Common Questions Predominate Over Any Question Affecting Only Individual Members

§ 5/2-801(2) is satisfied where there exist "questions of fact or law common to the class" and those questions "predominate over any questions affecting only individual members." 735 ILCS 5/2-801(2). Whether common questions of law or fact predominate in a case is determined by examining the claims asserted in the complaint on behalf of the named representatives and other members of the class. *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App. 3d 995,1001, 574 N.E.2d 760 (1st Dist. 1991) (citations omitted). "A class action can properly be prosecuted where a defendant is alleged to have acted wrongfully in the same basic manner as to an entire class." *Brooks v. Midas-Int'l Corp.*, 47. Ill. App. 3d 266, 361 N.E.2d 815 (1st Dist. 1977). In such a case, "successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." *Slimack*

v. Country Life Ins. Co., 227 Ill. App. 3d 287, 292-93, 591 N.E.2d 70 (5th Dist. 1992) (citations omitted). In *Miner v. Gillette Co.*, 87 Ill. 2d 7, 17, 428 N.E.2d 478 (1981), the Illinois Supreme Court underscored that the commonality requirement "is couched in the disjunctive... 'common questions of fact or law.'"

As pointed out by the plaintiffs in their "Response to the Defendants' Supplemental Brief" ("Plaintiffs' Response"), this Court has previously ruled, in its November 4, 2003 Order, that Illinois law applies to all the class members' claims. (*See*, Plaintiffs' Response, p. 15; November 4, 2003 Order, pp. 2-6). For the same reasons as articulated in this Court's November 4, 2003 Order (pp. 2-6), this Court again reiterates that the plaintiffs' allegations, namely that the scheme of receiving or being eligible to receive commissions/kickbacks was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois, and its further allegation that the commissions or undisclosed kickbacks where received in Illinois (Am. Compl., ¶¶ 3, 4, 5, 26 & 27), are sufficient to support this Court's ruling that both Daniel's and WCAA's claims (and in following, the class' claims) shall be governed by Illinois law.

Additionally, this Court finds that the precise issue impacted by this litigation (i.e. whether Aon's having received or being eligible for receipt, without the consent of its clients, undisclosed commissions or "kickbacks" in connection with the placement of insurance, violates their fiduciary or confidential obligations imposed under Illinois law), is an issue that all class members are seeking to litigate by way of this action. Therefore, this Court finds that a common question of law exists, sufficient to satisfy

the commonality prerequisite to class certification. Having determined that a common question of law exists in this matter, this Court need not further address, in detail, the issue of whether common questions of fact exist.[14] *Miner*, 87 Ill. 2d at 17.

However, as stated by the *Miner* court, "the finding of a common question of fact or law cannot alone satisfy the statutory requirement, for such common question must 'predominate' over the individual questions that may be involved." 87 Ill. 2d at 17. As such, this Court must further consider whether this common question of law predominates over any individual questions that might exist. The law provides that the individual plaintiffs' "[c]laims need not be exact duplicates to qualify for class certification..." *Eshagi*, 214 Ill. App. 3d at 1003-1004 (further providing that "[a] plethora of Illinois cases reveals.... that Illinois does not require the class members to have exact and duplicate causes of action and that the parties may have significant differences in their claims and yet be identified as members of a plaintiff class").

The defendants take the position that the following questions and issues predominate over any common question that might exist: (1) whether there exists a fiduciary or confidential relationship with each putative class member; (2) individual issues relating to traceability; (3) individual issues relating to materiality, knowledge and consent; (4) whether

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[14] This Court notes, however, that a common question of fact does exist, with respect to the proposed plaintiff class. More specifically, the issue of whether Aon received, or was eligible to receive, without the consent of its clients undisclosed commissions or "kickbacks" in connections with the placement of insurance, is an issue impacting all class members' claims.

individual defenses and issues such as the application of the Insurance Placement Liability Act, statutes of limitations and the voluntary payment operate with respect to each plaintiff's claims; and (5) whether Illinois law may be properly applied to all class members' claims, as will be required under a nation-wide class.

Contrary to the defendants' contention, the plaintiffs take the position that the defendants' arguments do not operate to bar this Court from granting their Motion for Class Certification. More specifically, the plaintiffs maintain the following: (1) individual issues of traceability do not operate to bar class certification, as plaintiffs are only "challenging compensation received based upon the loss ratio of the book of business referred and the aggregate amount of insurance referred" (Plaintiffs' Brief in Response, p. 8); (2) materiality is a class-wide issue properly resolved by way of the reasonable person standard; (3) issues relating to ratification, consent or voluntary payment do not bar class certification as Aon's purported disclosures do not satisfy the applicable law; (4) the statutes of limitations issues implicated by this action are neither related to, nor raise, individual issues; (5) Illinois law applies to all class members' claims; and (6) that the plaintiffs' proposed class definition assures that there exists either a fiduciary or confidential relationship with each class member, making individual inquiry unnecessary.

1. Whether There Exists Individual Issues Relating to Fiduciary or Confidential Relationships, Which Predominate over the Common Question

This Court notes that the plaintiffs' proposed class definition is drafted, in part, as follows: "[a]ll persons in the U.S. who directly or indirectly employed the services of a direct or indirect subsidiary of the Aon Defendants to obtain insurance or other similar risk solutions products..." (Am. Compl., ¶ 31). The defendants have raised the argument that not all plaintiff-defendant relationships implicated by this litigation are broker relationships, and that some Aon defendants are, in actuality, exclusive management agents or insurance companies. (*See*, Defendants' Supplemental Brief, p. 8). The plaintiffs take the position that the proposed class definition makes certain "that each and every class member would have, at least, a confidential relationship with the Aon Defendants." (Plaintiffs' Response, p. 7).

This Court finds that the plaintiffs' class definition is drafted in such a manner, so as to require that all putative class members have, at least, a confidential relationship with their respective Aon defendant. In other words, as pointed out by the plaintiffs, "the class only includes persons who actually employed Aon to obtain insurance on their behalf." (Plaintiffs' Response, p. 7). As such, this Court holds that the proposed class definition, having been qualified by the language, "...who directly or indirectly employed the services of a direct or indirect subsidiary of the Aon Defendants to obtain insurance" (Am. Compl., ¶ 31), is sufficient to satisfy the requirement that each class member in

fact have a fiduciary or confidential relationship with their respective Aon defendant. *See*, *Broadnax v. Morrow*, 326 Ill. App. 3d 1074, 1079, 762 N.E.2d 1152 (4th Dist. 2002) (stating that the relationship between an insured and his/her insurance broker is a fiduciary one); *Edwards v. Miller*, 61 Ill. App. 3d 1023, 1026-27, 378 N.E.2d 583 (5th Dist. 1978) (holding that a constructive trust may be imposed when a confidential relationship has been abused). Therefore, contrary to the defendants' position, individual inquiries in this regard do not operate as an impediment to class certification. Additionally, it is the Court's impression that the plaintiffs intend on tailoring their discovery requests such that they receive the names of individuals or entities that fit the class definition.

2. Whether Individual Issues Relating to Traceability Predominate Over the Common Question

The defendants argue that individual issues of traceability (i.e. whether, with respect to each class member, such commissions were based upon acts taken by their respective Aon defendant, with there also existing some basis or connection to the plaintiff for the undertaking of those actions) predominate over any common question. The plaintiffs respond by summarily stating that there is no traceability bar to class certification.

Initially, this Court notes that at the core of the plaintiffs' claims is the allegation that the class members were subject to an unknown conflict of interest when the Aon agent, with whom they had a relationship, procured insurance for them without disclosing the fact that the Aon agent was receiving, or was eligible to receive, a commission. (Am.

Compl., ¶¶ 3, 4, 6, 26 & 27). This Court again recognizes that, theoretically, there exist a number of approaches to the claims asserted by the plaintiffs. One of these theories would involve attempting to determine and quantify the out-of-pocket damages suffered by each class member. However, this might necessitate determining, in part, what insurance polices were available to the Aon agent at the time of procurement, the cost of those polices, and the terms of the policies.

Apparently, the plaintiffs in this action have not taken the above approach. Rather, they have opted to use a cause of action based upon a constructive trust theory, which limits any possible recovery to the disgorgement of the allegedly ill gotten profits (i.e. commissions). As such, under this specific theory of recovery, more important than tracing the particular funds to a particular plaintiff, is the identification of the total amount of undisclosed commissions. Consequently, bearing this in mind, the issue of traceability takes on less importance. Therefore, this Court holds that, under the unique theory of recovery alleged in the Third Amended Complaint, individual issues of traceability do not operate to bar class certification in this matter.

3. Whether Individual Issues Relating to Materiality, Knowledge and Consent Predominate Over the Common Question

With respect to issues of materiality, as stated prior in this Court's November 4, 2003 Order, "the test of materiality is... whether a reasonable and prudent investor would attach importance to those facts in determining his choice of action." (November 4, 2003 Order, p. 20); *Metzger v. New Century Oil and Gas Supply Corp. Income & Development*

Program – 1982, 230 Ill. App. 3d 679, 692, 594 N.E.2d 1218 (1st Dist. 1992). Contrary to the defendants' argument that there exist individual issues of materiality, the law articulates that materiality is determined according the objective "reasonable person" standard. *Metzger*, Ill. App. 3d at 692. As such, this Court finds that individual issues relating to materiality are minimal.

Additionally, with respect to knowledge and consent, as stated prior in this Court's November 4, 2003 Order, it is evident that "the complaint's allegations relating to the fiduciary nature of the relationships between [p]laintiffs and their relevant insurance broker(s), adequately establishes that information as related to the scheme of receiving commissions would necessarily qualify as '...knowledge which might affect [a] customer's decision concerning a pending transaction, or in any way affect[s] the transaction... '" (November 4, 2003 Order, p. 21 (citing *Martin*, 139 Ill. App. 3d at 1056)). Additionally, this Court has previously held that "the issue of whether [p]laintiffs ratified the [d]efendants' conduct raises genuine issue of material fact, more appropriately addressed on a motion for summary judgment or at trial." (November 4, 2003 Order, p. 23). For these same reasons, this Court finds that the defendants' arguments relating to knowledge and consent do not operate to bar class certification in this matter.

4. Whether Individual Issues Such as Application of the Insurance Placement Liability Act, Statues of Limitations and the Voluntary Payment Doctrine Predominate Over the Common Question

The Insurance Placement Liability Act provides that "no cause of action brought by any person or entity against any insurance producer, registered firm or limited insurance representative concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance shall subject the insurance producer, registered firm, ...to civil liability under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer, registered firm, ...of any money that was received as premiums, as a premium deposit, [etc.]." 735 ILCS 5/2-2201(b). This Court finds that the question of whether the undisclosed commissions were wrongfully withheld is an issue at the crux of each and every class members' claims. Therefore, this Court opines, for the reasons articulated prior in this Court's November 4, 2003 Order (pp. 11-13), and based upon the allegations contained in the Third Amended Complaint; that the issue of whether the Insurance Placement Liability Act operates to bar the plaintiffs' causes of action is a class-wide issue.

With respect to issues relating to the applicable statutes of limitations, this Court notes that the defendants' argument, in this regard, was raised in a very cursory fashion. (Defendants' Supplemental Brief, p. 14). However, the Court will address the issue. As pointed out by the plaintiffs, the law

provides that the claims of class members have been tolled during the pendency of this action. *Steinberg*, 69 Ill. 2d at 342 (holding that that "[t]he commencement of the class action suspends the applicable statute of limitations as to all asserted members of the class..."). Moreover, this Court agrees with the holding in *Mowbray v. Waste Management Holdings, Inc.*, 189 F.R.D. 194, 199 (D. Mass. 1999), which provides that "'courts have been nearly unanimous... in holding that possible differences in the application of a statute of limitations to individual class members... does not preclude certification of a class action..." (citations omitted).

More importantly, however, this Court's November 4, 2003 Order (pp. 2-6) ruled that Illinois law would be applied to both named plaintiffs' claims (and subsequently, to all class members' claims). As such, this prior ruling obviates the defendants' argument that individual statute of limitations issues would apply, as only a single statute of limitations, in fact, would be applicable to all class members' claims. Therefore, based on the foregoing, this Court finds, similar to the *Mowbray* court, that "...statute of limitations determinations do not negate commonality and predominance..." *Mowbray*, 189 F.R.D. at 199.

With respect to issues relating to the voluntary payment doctrine, as stated above, the issue of whether plaintiffs ratified the defendants' conduct raises genuine issues of material fact, which are more appropriately addressed on a motion for summary judgment or at trial. More importantly, however, this Court finds that any such individual questions of ratification and consent do not

predominate over the common question at issue in this litigation. As such, this Court finds that the defendants' argument relating to knowledge and consent do not operate to bar class certification in this matter.

5. Whether Illinois Law May be Properly Applied to all Class Members' Claims under a Nationwide Class

For the same reasons articulated in this Court's November 4, 2003 Order (pp. 2-6), and as stated above, this Court finds that the plaintiffs' allegations are sufficient to support the ruling that Illinois law may be properly applied to both named plaintiffs' claims, and subsequently, to the class members' claims. Therefore, this Court holds that no individual choice of law analyses will be required to be entered into by way of certifying a nationwide class in this matter.

In sum, this Court finds that the common question of law (namely whether Aon's having received or being eligible for receipt, without the consent of its clients, undisclosed commissions or "kickbacks" in connection with the placement of insurance, violates their fiduciary or abuse of confidential relationship under Illinois law), predominates over any individual issues that are may be implicated by this action. Therefore, this Court holds that the commonality and predominance prerequisites to class certification have been satisfied.

As alluded to earlier in this opinion and in this Court's November 4, 2003 Order, the Court is well aware that the defendants have a strong argument that the place of injury is the location of each

individual plaintiff, and that under a more traditional tort class action analysis, the location of the plaintiffs would most likely be determinative of the applicable law, and therefore, the law of the fifty (50) states would apply. In this regard, perhaps an argument could be made that this action should be divided into fifty (50) class actions.

However, this Court has a different view. In part, this opinion has been influenced by this Court's observance of the transformation of the plaintiffs' complaint and class definition from the commencement of the lawsuit until this final iteration. The plaintiffs have, in the final draft, devised a unique theory of recovery, to wit: a constructive trust theory, requesting the disgorgement of commissions and profits retained by and realized by the Illinois Aon entities, with said commissions resulting from a scheme that was devised in and enforced from Illinois.[15]

* * * *

[UNRELATED PORTION OMITTED]

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[15] *See*, Am. Compl., ¶¶ 3, 4, 5, 26 & 27.

D. Whether the Class Action is an Appropriate Method for the Fair and Efficient Adjudication of the Controversy

§ 2-801(4) is satisfied where "[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801(4). "In applying this prerequisite in a particular case, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain." *Gordon*, 224 Ill. App. 3d at 203 (citations omitted). When the "first three prerequisites of section 2-801 are established, [such] makes it evident that the fourth requirement is fulfilled." *Id.* at 204.

With respect to the three named Aon defendants (i.e. Aon Corporation, Aon Group, Inc., and Aon Services Group, Inc.), in light of this Court having determined that the first three (3) prerequisites to class certification have been satisfied, this Court holds that, as a matter of law, the fourth prerequisite has also been satisfied. *Id.* More importantly, however, it is this Court's ruling that a nationwide class is a suitable mechanism for the adjudication of the merits of this action, as this suit seeks declaratory injunctive relief on the common and encompassing issue of whether the Aon defendants' practices amount to breaches of fiduciary duty under Illinois law. In light of the plaintiffs' unique allegations supporting its constructive trust theory of recovery (i.e. that the scheme of receiving or being eligible to receive undisclosed commissions was centered in or emanated from Illinois, and further, that all funds eventually funneled back to

Illinois),[16] this Court is of the opinion that a nationwide class action is the most efficient method of adjudicating the common question of law which is evident in the plaintiffs' claims, as against the three named Aon defendants. Therefore, this Court finds that, with respect to the named Aon defendants, the fourth prerequisite to class certification has been satisfied.

However, with respect to the three remaining defendant entities (i.e. Affinity Insurance Services, Inc., K&K Insurance Specialties, Inc., and K&K Insurance Group, Inc. (d/b/a K&K Insurance Agency, Inc.)), this Court is further of the opinion that despite the first three prerequisites to class certification having been satisfied, certification of the plaintiffs' claims, as against these three entities, will not "best secure the economies of time, effort and expense, and promote uniformity..." *Gordon*, 224 Ill. App. 3d at 203 (citations omitted). More specifically, it is this Court's opinion that certification of the class members' claims as against these entities would not be efficient, in light of the fact that a limited number of the class members have had relationships with these three entities. As such, this Court holds that the fourth prerequisite to class certification has not been satisfied, with respect to these entities.

Based on the foregoing discussion, this Court grants the plaintiffs' § 5/2-801 Motion for Nationwide Class Certifica-tion on Counts I and II, solely with respect to the plaintiffs' claims as against the three (3) named Aon defendants.

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[16] *See*, Am. Compl., ¶¶ 3, 4, 5, 26 & 27.

V. CONCLUSION

In summary, this case presents an issue of public interest, namely the issue of whether it constitutes a breach of duty for an insurance broker to procure insurance for its client without disclosing the source and amount of commissions related to the policy. While each individual state is in a position to litigate this issue, the state of Illinois is in a unique position to address this issue on a nationwide basis, due to the particular allegations of the complaint, namely that Aon, from its Chicago headquarters, devised, implemented, supervised and enforced a scheme to keep knowledge of the received commissions secret from its clients, and that such undisclosed profits were, in effect, returned to in Illinois.

Based on the foregoing discussion, this Court, having determined that the four (4) prerequisites to class certification have been satisfied, grants the plaintiffs' § 5/2-801 Motion for Nation-wide Class Certification, on Counts I and II, with respect to the three (3) named Aon entities (i.e. Aon Corporation, Aon Group, Inc., and Aon Services Group, Inc.). However, with respect to the remaining three (3) remaining defendant entities (i.e. Affinity Insurance Services, Inc., K&K Insurance Specialties, Inc., and K&K Insurance Group, Inc. (d/b/a K&K Insurance Agency, Inc.)), this Court finds, as a matter of law, that the fourth prerequisite to class certification has not been satisfied, and as such, denies the plaintiffs' § 5/2-801 Motion for Class Certification.

ENTERED
/s/ Julia M. Nowicki
Julia M. Nowicki
Circuit Court Judge
July 28, 2004

APPENDIX H

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

ALAN S. DANIEL and WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, on behalf of themselves and All other persons similarly situated,	)	
	)	No. 99 CH 11893
Plaintiffs,	)	
v.	)	Judge Julia M. Nowicki
AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AFFINITY INSURANCE SERVICES, INC., K&K INSURANCE SPECIALTIES, INC., K&K INSURANCE GROUP, INC. (d/b/a K&K INSURANCE AGENCY, INC.),	)	
Defendants.	)	

MEMORANDUM OF OPINION AND ORDER

This matter comes before the Court on the Defendants' (hereinafter referred to as "Aon" or "Aon defendants"} Motion to Dismiss the Plaintiffs', Alan S. Daniel ("Daniel") and Williamson County Agricultural Association ("WCAA"), Third Amended Class Action Complaint, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619.

I. Background

Daniel is a self-employed independent life and health insurance agent, who obtained errors and omissions insurance through Affinity Insurance Services, Inc. ("Affinity"), a subsidiary of Aon. In actuality, the coverage was provided by Employers Reinsurance Corporation ("ERC"), which undertook 100% of the risk. ERC and Aon had agreed to profit sharing, allowing Aon to receive undisclosed commissions (or "kickbacks") from ERC on account of the insurance business Affinity placed with ERC.

The Plaintiff, WCAA, is a not-for-profit Illinois corporation that sponsors and organizes county fairs and similar activities. The Defendant, K & K Insurance Group ("K&K"), also a subsidiary of Aon, procured commercial liability insurance for WCAA from TIG Ins. Co. ("TIG") beginning in 1996. In 1993, TIG entered into a profit sharing agreement with K & K, whereby TIG agreed to pay commissions to K & K.

The Plaintiffs allege that the practice of the Defendants in receiving or being eligible to receive these commissions or kickbacks, without the Plaintiffs and other insureds' knowledge and consent and without having shared such commissions or

kickbacks with its insureds, violates the Defendants' fiduciary obligations to Plaintiffs and other insureds, constitutes a violation of Illinois' consumer protection laws, and constitutes common law unjust enrichment.

Plaintiffs' "Corrected Third Amended Class Action Complaint" ("Amended Complaint") contains five (5) counts as follows: (1) Count I - Breach of Fiduciary Duty and/or Abuse of Confidential Relationship and Inducement to Breach Fiduciary Duty or Abuse Confidential Relationship; (2) Count II - Conspiracy to Breach a Fiduciary Duty; (3) Count III - Violation of the Uniform Deceptive Trade Practices Act (815 ILCS 510/1, *et seq.*) (hereinafter referred to as the "UDTPA"); (4) Count IV - Violation of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1, *et seq.*) (hereinafter referred to as the "CFA"); and (5) Count V - Unjust Enrichment. The Defendants now move, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619, to dismiss the Plaintiffs' claims.

II. Discussion

A. Whether Illinois Law May Properly be Applied to the Claims of Both Daniel and WCAA

To properly address the Defendants' §§ 2-615 and 2-619 Motion to Dismiss, the Court must first address the issue of whether the Plaintiffs' claims should be governed by Illinois substantive law. The Defendants argue that Illinois law cannot be applied to the claims of both Daniel and WCAA and that application of the "most significant relationship" test of the Restatement (Second) of Conflicts of Laws, § 145, will result in the application two (2) different

states' laws to the claims presented by this matter. More specifically, Defendants argue that Illinois law applies to WCAA's claims against K&K, and New Jersey law applies to Daniel's claims against Affinity.

Contrary to the Defendants' position, the Plaintiffs maintain that under the "most significant relationship" approach of the Restatement (Second) of Conflicts of Laws, § 145, Illinois law applies to both Plaintiffs' claims, because the injury (retention of kickbacks) occurred in Illinois and because the conduct causing injury occurred in Illinois. In support of this contention, the Plaintiffs point out that they have alleged that the scheme was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois. (Amended Complaint, ¶ 4). In further support of their argument that Illinois law should apply to both Plaintiffs' claims, the Plaintiffs cite to *Grove v. Principal Mut. Life Ins. Co.*, 14 F. Supp.2d 1101, 1106 (S.D. Iowa 1998), and *Cunningham v. PSL Life Ins. Co.*, 42 F. Supp.2d 872 (N.D. Ia 1999).[17]

As the parties do not dispute what particular approach should govern this conflicts of law analysis (i.e. torts analysis under the Restatement (Second) of Conflicts of Laws, § 145 vs. contractual analysis under the Restatement (Second) of Conflicts of Laws, § 188), or more, specifically, dispute what the proper conflicts of law analysis should be as related to the breach of fiduciary duty claim, this Court need not address this issue. The Court would like to note,

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[17] This Court finds that *Grove* and *Cunningham* have minimal precedential value as related to the conflicts of law analysis in this action.

however, that authority does exist to support the proposition that in determining what law should apply to a breach of fiduciary duty claim, the proper analysis need not necessarily be the torts analysis of the Restatement (Second) of Conflicts of Laws, § 145. In fact, the Illinois Supreme Court has stated that "[t]his court has not accepted the Restatement (Second) of Torts view but has regarded breach of fiduciary duty as controlled by the substantive laws of agency, contract [citations omitted], and equity." *Kinzer v. City of Chicago*,128 Ill.2d 437, 445, 539 N.E.2d 1216 (1989). However, as stated prior, the parties do not take opposing views as to this issue and as such, this Court holds that the "most significant relationship" approach articulated in the Restatement (Second) of Conflicts of Laws, § 145, analysis will govern the conflicts of law analysis in this matter.

Under the Restatement (Second) of Conflicts of Laws' "most significant relationship" approach, the forum with the most significant relationship is determined by considering (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the parties' domiciles and places of business, and (4) the place where the parties' relationship is centered. Restatement (Second) of Conflicts of Laws, § 145; *Esser v. McIntyre*, 169 Ill.2d 292, 298, 661 N.E.2d 1138 (1996).

The parties do not dispute that the place of injury for WCAA's claims is Illinois. However, the parties reach this "agreement," based on differing analyses. Defendants reach this conclusion based upon the fact that WCAA is headquartered in Illinois and as such, the place of injury for this plaintiff is

clearly Illinois. Defendants further stress that the prevailing law holds that of the four Restatement factors, the "place of injury" is the most important. *See Ingersoll v. Klein*, 46 Ill.2d 42, 45, 262 N.E.2d 593 (1970). According to Defendants, it follows that Illinois law should apply to WCAA's claims. Likewise, based on this same rationale, the Defendants conclude that New Jersey law should be applied to Daniel's claims, in light of Daniel being a New Jersey resident. Contrary to the Defendants' rationale, however, the Plaintiffs have taken the position that as the injury (retention of kickbacks) occurred/occurs in Illinois, Illinois law must govern both named Plaintiffs' claims.

This Court adopts the Plaintiffs' position that its allegations that the scheme of receiving or being eligible to receive commissions/kickbacks was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois, and its further allegation that the commissions or undisclosed kickbacks where received in Illinois (Amended Complaint, ¶ 4), are sufficient to substantiate the finding that the "place of injury" is Illinois for both named Plaintiffs. Restatement (Second) of Conflicts of Laws, § 145. Therefore, it is this Court's ruling that based upon the allegations of the complaint, the facts indicate that Illinois serves as "the place where the injury occurred," for both, WCAA and Daniel. Restatement (Second) of Conflicts of Laws, § 145. Although the case law is uniform in stating that the "place of injury" factor is generally the most important factor, this factor is still just one of the factors for the court to consider. In this matter, in light of Plaintiffs' overall theory that Plaintiffs suffered no damages other than what was wrongfully retained by the

Defendants, this Court finds that the typical conclusion by the courts in the case of economic loss, that the residence of the plaintiff is considered the "place of injury," is less persuasive.

As to the § 145 factor of "the parties" domiciles and places of business," the factual allegations indicate that the Defendants have principal places of business in Illinois. (Amended Complaint, ¶¶ 2, 14-19). Additionally, WCAA is headquartered in Illinois. (Amended Complaint ¶ 13). Although Daniel is a New Jersey resident (Amended Complaint, ¶ 12), this Court has already ruled prior that based upon the allegations, the § 145 factor of "place where the injury occurred" is Illinois. As such, this Court finds that the fact that Daniel is not an Illinois resident is simply not determinative of the conflicts of law analysis in this matter.

As to the § 145 factor of "the place where the conduct causing the injury occurred," this Court finds that as to both named Plaintiffs, Illinois serves as the location of the alleged conduct, as the Aon Defendants are alleged to have their principal places of business in and operate their insurance brokerage business from Illinois. (Amended Complaint, ¶¶ 2, 14-19). As to the § 145 factor of "the place where the parties' relationship is centered," Illinois would logically serve to be the center of WCAA's and K&K's relationship, since both parties are either registered to do business in Illinois or have principal places of business in Illinois. (Amended Complaint, ¶¶ 13 & 19). As to Daniel's and Affinity's relationship, the allegations indicate that Affinity has a principal place of business in Illinois. (Amended Complaint ¶ 17). As such, it follows that Affinity's acting as Daniel's broker, was centered in Illinois. Therefore,

based on the foregoing, this Court finds that both WCAA's and Daniel's claims shall be governed by Illinois law.

* * * *

[UNRELATED PORTIONS OMITTED]

III. Conclusion

Based on the foregoing, this Court denies the Defendants' Motion to Dismiss Counts I, II, IV and V, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619, and grants the Defendants' Motion to Dismiss Count III, pursuant to 735 ILCS 5/2-615, with leave granted to Plaintiffs to replead within twenty-eight (28) days.

ENTERED:

ENTERED

NOV 04 2003
JUDGE JULIA M.
NOWICKI - 293

Julia M. Nowicki
Circuit Court Judge
November 4, 2003

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No. 09-110 (2)

Supreme Court, U.S.
FILED
AUG 27 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HCA INC., BRIDGESTONE AMERICAS, INC. F/K/A BRIDGESTONE AMERICAS HOLDINGS, INC., HUNTSMAN CORPORATION, NECHES GULF MARINE, INC., AND HORNBECK OFFSHORE SERVICES, INC.,

Petitioners,

v.

AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., ALAN S. DANIEL AND WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS ALAN S. DANIEL AND WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED (PLAINTIFFS-RESPONDENTS)

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QUESTION PRESENTED

In the context of a nationwide opt-out class action settlement, did the court below err in holding that, when a state has a sufficient aggregation of contacts with the claims of the class members, that court may constitutionally apply the state's own substantive law in a manner that is neither unfair nor arbitrary?

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COUNTER-STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is materially incomplete and inaccurate. The record in this action demonstrates that the decision below is a fact-specific application of firmly settled doctrine that presents no occasion for this Court's review.

A. The Class Claims and Their Procedural History

1. In August 1999, plaintiff Alan Daniel commenced this class action in the Circuit Court of Cook County, Illinois, Chancery Division (the "circuit court"), against defendant Aon Corporation and certain of its subsidiaries. Mr. Daniel brought the action on behalf of himself and a class of persons who obtained insurance through Aon.[1] Aon Corporation is an insurance brokerage company with its principal place of business in Chicago, Illinois. It operates its insurance brokerage primarily through its Illinois-based subsidiaries, defendants-respondents Aon Group, Inc. and Aon Services Group, Inc., and their operating subsidiaries.

The complaint alleges that Aon places insurance for its customers without disclosing that Aon receives hidden profits, including profit sharing or so-called

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[1] Unless otherwise noted, Aon Corporation and the other Aon-related defendants are collectively referred to herein as "Aon" or the "Aon defendants."

"contingency fees" from the insurance carrier with whom it places its customers' insurance coverage. Aon Corporation and its chief executive officer, both situated in Illinois, were directly involved in this business, including the management of the business practice challenged in this litigation--Aon's profit sharing policies--as evidenced by Aon's chief executive officer's public statements concerning Aon's practices. R. 1239, 3982; R. 13805-09 (Complaint ¶¶ 5, 14-17).[2]

2. Shortly after the commencement of the action, defendants moved to dismiss pursuant to 735 ILL. COMP. STAT. 5/2-619, asserting that Aon Corporation, Aon Group, Inc., and Aon Services Group, Inc., cannot be held liable for conduct by their subsidiary, Affinity Insurance Services, Inc. Plaintiffs argued that the wrongdoing was conducted by a unified organization headed by Aon Corporation. The circuit court agreed, denying defendants' motion.

In June 2000, defendants moved for summary judgment or, alternatively, for the setting of a bifurcated proceeding. Defendants argued that there was no fiduciary relationship between plaintiff and defendants. On January 28, 2001, the circuit court denied defendants' motion for summary judgment.

On February 13, 2001, plaintiff amended the

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[2] All references to the complaint are to the Corrected Third Amended Complaint ("Complaint").

complaint to, *inter alia*, add Williamson County Agricultural Association ("WCAA") as a plaintiff and K&K Insurance Group, Inc. and K&K Insurance Specialties, Inc. as defendants. Plaintiffs also moved for class certification at that time, asking the court to certify a nationwide class.

3. The substantive claims asserted in the complaint were not based upon individual damages incurred by individual class members throughout the United States, but upon monies collected by Aon subsidiaries and returned to Illinois. Plaintiffs obtained the certification of a nationwide class on July 28, 2004, alleging that contingent commissions received by Aon in Illinois were subject to a constructive trust. App. 99a–100a, 115a. The very nature of the scheme alleged dictated this approach, as the improperly collected profit sharing monies were collected at the corporate level, not from the individual class members. Accordingly, the circuit court concluded that nationwide class certification was proper given, *inter alia*, plaintiffs' assertion of a constructive trust theory of recovery. *Id.* For this reason, it was unnecessary to determine the out-of-pocket damages suffered by each class member. App. 110a. In contrast, the broad approach that had been urged by petitioners would have "necessitate[d] determining, in part, what insurance policies were available to the Aon agent at the time of procurement, the cost of those policies, and the terms of the policies." *Id.*

4. In three separate opinions dated November 4, 2003, July 28, 2004, and November 1, 2004, the circuit court held that Illinois law could properly be applied to all class members because of the numerous and essential contacts with Illinois. App. 119a-126a, 97a-118a, 87a-97a. The circuit court found that Illinois had an intimate involvement with the class' claims, including, the collection of Aon's monies in Illinois.

a. In the circuit court's November 4, 2003 decision, Judge Nowicki examined plaintiffs' and defendants' conflict of law analyses, and adopted plaintiffs' argument that:

> under the most significant relationship approach of the RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145, Illinois Law applies to both Plaintiffs' claims, *because the injury (retention of kickbacks) occurred in Illinois and because the conduct causing injury occurred in Illinois.* In support of this contention, the Plaintiffs point out that they have alleged that the scheme was originated, planned, orchestrated and continues to be supervised by the Aon Defendants in and from Illinois.

App. 122a (emphasis added). Thus, in its November 4, 2003 order, the circuit court correctly found that Illinois law applied, based upon application of the

"torts analysis under the RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145" to which the parties had agreed. *Id.*

Given the parties' agreement as to the applicable law, the circuit court applied the "most significant relationship approach" (App. 122a), finding that the most important factor in this approach was the place of injury – Illinois. "This court adopts the Plaintiffs' position that its allegations that the scheme of receiving or being eligible to receive commissions/kickbacks was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois, and its further allegation that *the commissions or undisclosed kickbacks where [sic] received in Illinois*, . . . are sufficient to substantiate the finding that the 'place of injury' is Illinois". App. 124a (emphasis added).

b. In two later decisions dated July 28, 2004 and November 1, 2004, the circuit court again adopted this analysis, rejecting the argument that a state-by-state analysis was required and applying Illinois law to all class members:

[T]his Court further notes that the plaintiffs' complaint articulates a particular theory of recovery that constitutes another valid and reasonable analysis by which the alleged wrongs sustained may be redressed. The plaintiffs have asserted that Illinois may serve to adequately and properly dispose of these issues, as pled, on a nationwide scale, and have cited to Illinois law to support this proposition. [Numerous citations omitted].

Additionally, as noted above, the plaintiffs have been very selective in their choice of theory of recovery. Their lawsuit employs an uncommon perspective, as it does not incorporate as its foundation the out-of-pocket damages sustained by each individual class member. Rather, the plaintiffs have chosen a constructive trust theory to form their measure of damages, and assert that the plaintiffs' damages are properly measured by the disgorgement of profits retained by the Aon entities. As stated prior, the plaintiffs assert that the scheme emanated from Illinois and the fruits of the scheme were realized in Illinois. The plaintiffs argue, and this Court cannot disagree, that the manner in which the complaint is pled in

> conjunction with the unique theory of recovery makes the choice of Illinois as the forum for resolution of this action all the more appropriate.

App. 99a - 100a (July 28, 2004 Opinion).

The circuit court again summarized its analysis in its November 1, 2004 opinion:

> The defendants have argued that the place of injury is where the individual plaintiffs suffered his/her/its loss. *See Ingersoll v. Klein*, 46 Ill. 2d 42, 45, 262 N.E.2d 593 (1970). The Court agrees that the law normally places great weight on that factor. However, as stated previously, this case is not claiming damages to the plaintiffs in the ordinary sense, but rather claims the plaintiffs are entitled to his/her/its fair share of the disgorgement of undisclosed commissions. These commissions, plaintiffs assert, are in the control of the defendants located in Illinois. Since Illinois law properly applies, this Court need not engage in individual conflicts of law analysis for the 50 states. *See Martin*, 117 Ill. 2d 67.
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> * * *
>
> Plaintiffs have also alleged that the scheme of receiving or being eligible to

> receive commissions/kickbacks was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois and the undisclosed commissions or kickbacks were received in Illinois. To further support this claim, plaintiffs have pointed out to this Court that the decision to terminate this practice of receiving commissions/kickbacks was unilaterally made in Illinois without first consulting any of its alleged independent entities.

App. 91a - 92a, 94a - 95a.

5. This action does not involve a forum that has little or no relationship to the transaction, but one that was centrally involved in both the creation of the practice complained of and the receipt of the proceeds that the illegal conduct had generated.

a. As pled, the Aon defendants are headquartered in Illinois and they operate their nationwide insurance brokerage business under the law of the State of Illinois. The Aon defendants arranged and/or directed from their headquarters in Chicago, Illinois the practices whereby they or their subsidiaries received, directly or indirectly, undisclosed profit-sharing or bonus commissions for placing insurance with insurers. These profit-sharing or bonus commissions were transferred or paid by the Aon defendants' subsidiaries to the Aon defendants. Even

if the secret commissions had been received outside Illinois, they landed in and were controlled by Illinois. The Aon defendants developed and controlled these transactions. Thus, the wrongdoing alleged concerned ongoing transactions that were taking place in the state of Illinois, and Aon continued to maintain control over these transactions in Illinois.

The lower court also found that the ability of Aon Corporation to terminate all profit sharing agreements between its affiliates and insurance companies shows their control over profit sharing arrangements of all the Aon entities. App. 95a.

b. The Aon defendants' document production during the litigation supports this judicial conclusion. First, many of the profit sharing agreements produced are between insurance companies and either Aon Risk Services in Illinois or Aon Corporation in Illinois. Existence of these agreements with the parent entities in Illinois shows that the profit sharing agreements were coordinated, supervised and arranged by the class defendants in this action who are situated in Illinois. Aon produced documents, copies of which are part of the record below (Plaintiffs' Response to Motion to Certify, Jan. 7, 2005, Exs. C and D) showing that communications regarding profit sharing with insureds by Aon agents and employees anywhere in the United States were literally drafted and coordinated by two senior officers of Aon Risk Services in Chicago, again demonstrating control of these entities and profit sharing

relationships by the defendants in Illinois. *Id.* at Ex. D (brief submitted by Aon defendants in a litigation in California, pp. 9-10, asserting that rights of parties relating to practices at issue here are best adjudicated in Illinois and enumerating contacts in Illinois).

c. These facts fully support the circuit court's determination certifying a nationwide class under Illinois law. The circuit court considered the issue of whether Illinois law or the law of each state would apply to plaintiffs' claims three times, and each time concluded that Illinois law would apply. In its opinion, described and discussed more fully below (pp. 20-24, *infra*), the Illinois appellate court examined the certification ruling *de novo* (App. 18a) and fully agreed with the circuit court's analysis. Similarly, the Illinois Appellate Court rejected petitioners' argument that even if Illinois choice-of-law could apply, it should not apply, an issue of no independent constitutional significance. App. 24a.

B. The Settlement

1. After almost six years of litigation, in March 2005, plaintiffs entered into a memorandum of understanding settling this action. The total value of the cash component of the Settlement of this class action is $87 million.[3] In addition to the $38 million

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[3] Separately, the parties to the Attorneys General action, including the Illinois Attorney General, negotiated a settlement of that action ("AG Settlement") with Aon at the same

cash payment provided for by the *Daniel* settlement agreement, class counsel also bargained for the right to obtain the spillover or unclaimed funds from the AG Settlement totaling approximately $49 million as additional consideration to be paid to the Class. But for this provision in the Daniel settlement agreement, Aon could have used those funds "to satisfy any pending or other claims asserted by policyholders relating to these matters," pursuant to the AG Settlement. App. 72a. The Settlement also provided for injunctive relief.

2. a. On March 9, 2005, the circuit court issued an order preliminarily approving the settlement and ordering the notice be given to the class. R. 2276-82. In that order, the circuit court "expressly recognize[d] that the Attorney General Settlement was a result of the active litigation in this case by class counsel." R. 2278. Fifty objections, representing a minute fraction of class members, were filed. Most were withdrawn prior to the fairness hearing conducted by the circuit court, R. 14097, at which only nine objections on behalf of approximately 18 objectors were presented. R. 15687. Of those objectors, several were litigants in an MDL action or in other litigation against Aon and thus were motivated by their own self-interest. R. 14084, 15688, 15697.

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time as the plaintiffs and Aon were negotiating a settlement of this action. R. 5571, ¶ 4; R. 4886. The Attorneys General's lawsuits came a full five-and-a-half years after the commencement of this action.

b. The circuit court reviewed an extensive amount of material in approving the settlement. Prior to the fairness hearings, the circuit court conducted numerous conferences with the parties and objectors, including petitioners herein, regarding the settlement and permitted objectors to obtain a large volume of discovery to allow them to evaluate the settlement. On December 6 and 7, 2005, the circuit court held full days of evidentiary hearings on the settlement. Counsel for the parties, as well as counsel for objectors, were given a right to be heard for and against the settlement. After additional briefing, including submissions of proposed findings of fact and law (R. 15664-15707), and additional discovery provided to objectors, on March 7, 2006, the circuit court held a third hearing with respect to objections and discovery. R. 90-138 (Vol. 79).

3. On April 18, 2006, the circuit court issued a 24-page corrected memorandum opinion and order. App. 58a-86a. That opinion discussed in great detail the background of the litigation, plaintiffs' complaint and the various defenses that Aon had asserted and would assert if the litigation continued. The circuit court then addressed each of the appropriate factors for evaluating class action settlements, finding that the settlement was fair and reasonable. The circuit court's opinion also addressed the objections in nine pages. App. 69a-80a (R. 16557-16565).

4. a. Petitioners suggest that plaintiffs rode the coattails of the Attorneys General investigations.

The simple chronology of this action proves that false. As was found by the circuit court in approving the settlement, for six years plaintiffs and their counsel litigated this immensely complex class action litigation on behalf of purchasers of insurance who had employed Aon as a broker. App. 61a. After this action had been litigated in the circuit court for over five years without the benefit of any governmental investigation, New York's Attorney General, as well as other Attorneys General, announced in October 2004 that they had investigated and were suing Aon and other major insurance brokers based upon substantially the same misconduct asserted by plaintiffs - *e.g.*, undisclosed contingent commissions paid to Aon as insurance broker.

Were it not for the *Daniel* settlement, most of the class members who purchased insurance products through Aon would have had no avenue of redress because the applicable statute of limitations would have barred their claims. Plaintiffs succeeded in obtaining a substantial recovery for the class based upon a novel theory of disgorgement based upon a constructive trust. App. 59a-61a. Moreover, as the circuit court concluded, this litigation itself was "instrumental in reversing a longstanding custom in the insurance brokerage industry" that plaintiffs alleged was improper. App. 60a.

b. Contrary to the contention of petitioners (Pet. 9, 17 n. 1, 31), the certified class was not a settlement class. The circuit court expressly

found that the scope of the certified class was the same as the class in the settlement. App. 71a, R. 15224. Even if the class here had been certified as a settlement class only, the Court need not inquire as to any supposed manageability problem as these petitioners contend. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("in a "settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems....").

REASONS FOR DENYING THE PETITION

This petition seeks review of an Illinois appellate court's judgment upholding a trial court order approving a nationwide opt out class action settlement. The petition discloses no basis – none – calling for this Court's intervention: No "important question of federal law" was announced or decided by the court below. Sup. Ct. Rule 10(c). Rather, the Illinois decision presents only a fact-specific instance of a state court applying uncontested law to a particular set of facts and circumstances.

1. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-14 (1985), indisputably establishes that state courts can entertain nationwide class actions, so long as certain procedural safeguards are in place, including the right of class members to opt-out. Moreover, CAFA (The Class Action Fairness Act of 2005 (codified at 28 U.S.C. §1332(d) and various other sections of the United States Code)), which petitioners briefly mention (Pet. 28), is among the congressional acknowledgments that state court class actions are constitutionally permissible, albeit subject to ultimate congressional control.

2. a. The Illinois Appellate Court, which reviewed the circuit court's certification order *de novo* (App.18a), determined that Illinois had sufficient contacts with the claims of all the class members to justify application of Illinois substantive law to their claims. Again, the *only* constitutional question,

therefore, is whether Illinois substantive law *could* be constitutionally applied to the claims of all class members who did not opt out. Under this Court's precedents, this is clearly constitutionally permissible when the state has a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests' in order to ensure that choice of [a state's] law is not arbitrary or unfair." *Shutts*, *supra* 472 U.S. at 821-22, *quoting Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). That Illinois had sufficient contacts with the class claims does not, of course, mean that the law of some other state or states could not also be constitutionally applied to some or all of the same claims. Multi-state cases "may justify, in constitutional terms, application of the law of more than one jurisdiction." *Allstate*, *supra*, 449 U.S. at 307; *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 495-96 (2003).

b. As this litigation illustrates perfectly, the typical choice-of-law question is not whether a state court *could* constitutionally apply its own substantive law, but whether it *should*. It is well recognized that more than one rule of law properly may be applied (*see*, Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719, 721-34 (2009)), but, regardless, the "should" question presents *no* federal question. *Allstate*, *supra*, 449 U.S. at 307 ("It is not for this Court to say...whether we would make the same choice-of-law decision if we were sitting as the [state supreme

court]."). Again, the *only* constitutional question, therefore, is whether Illinois substantive law *could* be constitutionally applied to the claims of all class members who did not opt out.

3. The Illinois Appellate Court fully understood what *Shutts* required. The Appellate Court said: "For choice of law questions, Illinois adopts the most significant contact test articulated in the Restatement (Second) of Conflict of Laws (1971)." (App. 18a). That standard, a multi-factored one, is plainly constitutional, and the court below correctly applied it here. Even if, however, this or any other court would have applied the Restatement (Second) differently, that would provide no grist for this Court's mill. *Allstate*, *supra*, 449 U.S. at 307; Sup. Ct. R. 10; E. Gressman, et. al., SUPREME COURT PRACTICE § 4.14 (9th ed. 2007).

4. a. We are at a loss to understand what the petition believes to be the constitutional deprivation of "liberty" or "property" allegedly sanctioned by the Illinois Appellate Court in approving this opt out settlement. That court reviewed the certification order *de novo*, looked explicitly at the relationship between Illinois and the claims of all class members, and decided that Illinois law both could and should be applied. See pp. 20-24, *infra*. The petition asserts, however, that due process "require[s] an individualized choice of law analysis for each class member's claim *before* a single state's law may be applied to a nationwide class action." (Pet. i, Questions Presented)

(emphasis added).[4] But Illinois' contacts with the parties' claims are either constitutionally sufficient or they are not, and resolution of that issue does not depend on whether those contacts are looked at *ex ante* or *ex post* a multi-state survey.

b. The claim that application of Illinois law is unfair to petitioners passes our understanding. Petitioners say (Pet. 29) that, if Tennessee substantive law applied, petitioner HCA could have received a great deal more money. If so, petitioner should have opted out.[5] That option was accorded to it, as *Shutts* required.

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[4] Petitioners occasionally make reference to the Full Faith and Credit Clause. But, despite Sup. Ct. R. 14(1)(g)(i), the petition nowhere specifies where such an issue was raised in the state courts. Compare Sup. Ct. R. 14(1)(g)(i) with Pet. at 33. Since that claim was not "specially set up or claimed," 28 U.S.C. § 1257, no full Faith and Credit issue is open here. *E.g. Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969); *Webb v. Webb*, 451 U.S. 493, 499-501 (1981). We pursue the matter no further because the Full Faith and Credit argument adds nothing to the Due Process Clause in this area. *Allstate*, *supra*, 449 U.S. at 308, n.10 (plurality opinion); *id* at 332 (Powell, J., dissenting); *Shutts*, 472 U.S. at 818-19.

[5] In fact, the class includes numerous corporate entities. Moreover, a number of major corporate entities, which had opted out of the class, opted back *in* to the class settlement, including, for example, American Airlines, Inc., Pacific Gas & Electric Company, Time Warner, John Deere & Company, and the Tribune Company. R. 14022-23, 14073.

ARGUMENT

This Petition Presents No Important Issue Of Federal Law

A. The Illinois Proceedings

1. While we have set out the facts in some detail, *supra*, the ones of material concern to this Court are far more succinctly stated. This litigation is no more than a fact-specific, run of the mill state court opt-out class action. The Illinois circuit court complaint charged defendants, Aon Corporation, and its affiliates, the world's second largest insurance and largest reinsurance broker, with wrongdoing in obtaining commissions and other kickbacks from insurance companies to whom it steered business all in disregard of their duties to policy holders. The wrongful conduct was conceived of, originated, and supervised at Aon's Illinois headquarters, and the fraudulent payments were received there. App. 95a, 100a, 122a. Defendants vigorously opposed certification of a nationwide opt out class, asserting a wide array of objections, *inter alia*, the necessity for state-by-state analysis of choice of law. In granting certification, the circuit court entered three carefully reasoned opinions dealing with the certification of such a class. App. 58a-126a. After defendants settled, various objectors (all of whom could have opted out) continued to press appeals. On July 9, 2008, the Appellate Court of Illinois, First District, in an expansive opinion, upheld the class certification and

settlement. App. 3a-52a. On March 25, 2009, the Illinois Supreme Court declined leave to appeal. App.1a.

2. The Illinois courts rejected a wide array of challenges, relating to the adequacy of notice, lack of discovery, admissibility of evidence, fairness of the settlement, and the size of the award of attorneys' fees. It is not suggested that any of these rulings is for this Court's inspection.

B. The Illinois Certification Ruling

1. The Appellate Court, whose judgment is under review here, set out the objectors' class certification claims in Part III of its opinion, stating "we will consider any potential due process concerns raised in this case." App.17a. Part IV, entitled Choice of Law, sets forth the court's reasoning. The Appellate Court began with a careful separation of the "could" from the "should" issue:

> The objectors argue that Illinois law cannot apply to a nationwide class of policyholders. The argument is two-fold. *First,* we must determine whether Illinois law *can* apply to a nationwide class of insureds that obtained insurance through Aon. Critical to the first question is whether or not Illinois choice of law rules permits Illinois law to apply to a nationwide class of policyholders. The

> second closely related question is whether Illinois law *should* apply. In answering the second question, we must determine whether the trial court is required to canvass the laws of all fifty states prior to certifying a nationwide class under Illinois law. App. 17a-18a (emphasis added).

2. The Appellate Court then turned to the Illinois choice-of-law law issue, which it reviewed *de novo*: "[a]ppellate review of a trial court's choice-of-law decision is reviewed *de novo*." App. 18a. The Appellate Court said:

> For choice of law questions, Illinois adopts the most significant contact test articulated in the Restatement (Second) of Conflict of Laws (1971). *Esser v. McIntyre*, 169 Ill. 2d 292, 298 (1996). The most significant relationship test requires a court to consider "(1) where the injury occurred; (2) where the injury-causing conduct occurred; (3) the domicile of the parties; and (4) where the relationship of the parties is centered." *Esser*, 169 Ill. 2d at 298 (*citing Ingersoll v. Klein*, 46 Ill. 2d 42, 47 (1970)). *Id.*

3. After stating Illinois' general approach, the Appellate Court turned to the question of whether Illinois law *could* be applied in this litigation.

Contrary to petitioners' frequent assertions (see Pet. 9,10,14, 16,18, and 23), the Appellate Court - which, we emphasize, examined the certification issue *de novo* and whose judgment alone is the subject of this Court's review - examined the relationship of the claims of all the class members to Illinois, not just the claims of the class representatives:

> Objectors first complain that the trial court did not perform a state-by-state analysis to determine what law applied to the members of the class. Instead, the trial court applied Illinois law to all members of the class-members that are present in all 50 states.
>
> In three separate opinions, the trial court applied the most significant relationship approach to the claims of the Daniel Class and each time determined that Illinois substantive law should apply. The trial court justified application of Illinois law to a national class for two reasons. First, Aon's center of business was located in Illinois, the wrongful scheme alleged was "originated, planned, orchestrated and continues to be supervised by the Aon Defendants in and from Illinois."
>
> Second, the Daniel Class's theory of recovery justified the application of

> Illinois Law. At the certification stage of the case, the Daniel Class argued for class certification based upon the somewhat novel and untested theory of a "constructive trust." Under the constructive trust theory, the Daniel Class argued that each member was entitled to a pro rata share of the ill-gotten profits obtained by Aon by way of their contingent commissions. This avoided the problem of determining the out of pocket expenses of each individual plaintiff. The trial court noted that, because the case was, in effect, the Daniel Class's claim to "his/her/its fair share of the disgorgement of undisclosed commissions," the commissions are in control of Aon, and located in Illinois. Because commissions were under the control of an Illinois defendant, Illinois law applied.

App. 19a.

4. The Appellate Court then concluded:

> The trial court properly applied the "most significant-relationship test." The unique nature of the theory of recovery alleged in this case downplays the significance of the "location of the injury" factor articulated in Illinois choice-of-law

> jurisprudence. Further, the Daniel Class brought its claim against Aon based upon Aon's retention of ill-gotten funds. The injury is the result of the contractual relationship entered into by insurance purchasers, insurance brokers, and insurers.
>
> The injury causing conduct most likely occurred in Illinois. While many class members entered into contracts in states other than Illinois, the fraudulent conduct was, as the trial court found, primarily devised and undertaken at Aon's principle [sic] headquarters in Illinois.

App. 20a. After distinguishing two cited decisions, one an Illinois case, the other a decision of the Seventh Circuit (App. 20a – 22a), the Appellate Court then went on to satisfy itself that, as a choice-of-law matter, Illinois should be applied. App. 21a – 24a.

C. Petitioners' Constitutional Challenge

1. Despite the petition's frequent citations to such cases, this petition is not about Fed. R. Civ. P. 23, or the limitations it imposes on federal court class certification. The sole issue here is the limits imposed by the Constitution on certification of state court nationwide opt out classes. More narrowly still, the

issue is the extent to which the Constitution limits application of the state's own law to the claims of the class members. As we have said, due process prohibits application of the Illinois substantive law *only* if Illinois lacks a "significant contact or aggregation of contacts" with the underlying transaction, *Shutts*, *supra*, 472 U.S. at 821-22, quoting *Allstate*, *supra* 472 U.S. at 312-13, a narrow limitation rarely transgressed. *Allstate*, *supra*, 472 U.S. at 312-13 n.17.

2. The misconduct perpetrated upon all the class members was conceived of, planned, orchestrated, and supervised in Illinois, and the payments generated by that misconduct were received in Illinois.[6] These contacts – all of which are pre-litigation contacts with Illinois – are constitutionally sufficient to justify application of Illinois substantive law to the claims in dispute. This is especially apparent, as any dissatisfied petitioners could have availed themselves of what they believed to be a more favorable substantive law simply by opting out of the class action.

3. Instead of opting out, however, petitioners ask this Court to fashion some new due process choice-of-law rule, the dimensions of which petitioners nowhere near suggest. Deeply embedded doctrine now holds that, so long as the state has sufficient contacts

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[6] *See supra* at 3, 22-23 (contingent commissions received in Illinois were subject to a constructive trust).

with the underlying claims, it *can* constitutionally apply its own substantive law. It need not do so, of course. That is the "should" issue. And as *conflict of laws* casebooks make plain, there are numerous "modern" approaches to the "should" question. Illinois, follows the Restatement of Conflicts (Second); it applies the law of the state with the most significant contacts. Any divergence in approach to the "should" questions is but an inherent aspect of Our Federalism, *Younger v. Harris*, 401 U.S. 37, 41 (1971).

4. If petitioners are suggesting that the Due Process Clause requires the Illinois courts (and subject to review, this Court) to "balance" Illinois "interests" against the "interests" of other states before Illinois can constitutionally apply its own substantive law, any such argument has been foreclosed for decades.[7]

5. In light of this settled doctrine, it is wholly unclear what petitioners complain of. Either the Illinois contacts are constitutionally sufficient or they are not. Engaging in a multi-state survey may be a permissible choice of law approach, but it has nothing to do with the constitutional sufficiency of a state's contacts.

---

[7] *Allstate, supra*, upheld the application of state law without inquiring whether another state had a greater interest. *See also, Franchise Tax Board v. Hyatt*, supra, 538 U.S. at 495-96, explicitly noting that "we abandoned the balancing-of-interest approach to conflict of law..."; *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 502-05 (1939).

D. Petitioners' Additional Claims

The final pages (Pet. 26-34) of the petition are revealing, but they require little comment. Quite clearly, petitioners do not like state court class actions. Essentially, their argument runs as follows: 1) nationwide state court class actions are bad; 2) nationwide state court class actions in Illinois are very bad; 3) nationwide state court class actions in Madison County are very, very bad[8]; and 4) this case presents the first clear opportunity for the Court to rule on these actions.

---

[8] For the record, the class action in this case originated in Cook, not Madison, County, Illinois. App. 119a.

The first three arguments should be addressed to Congress, not to this Court. They say nothing whatsoever relevant to why this petition presents an important question of federal law calling for this Court's intervention. As to the final argument, petitioners note that "questions similar to [p]etitioners' have been raised numerous times in the past." Pet. 31. Perhaps, the reason they have not been taken is because they are so insubstantial, and, far from being a clear opportunity, this case possesses the singular feature of a constructive trust respecting an Illinois based res.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: August 27, 2009

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Supreme Court, U.S.
FILED
SEP 3 - 2009

No. 09-110

In the Supreme Court of the United States

HCA INC., BRIDGESTONE AMERICAS, INC. F/K/A BRIDGESTONE AMERICAS HOLDINGS, INC., HUNTSMAN CORPORATION, NECHES GULF MARINE, INC., AND HORNBECK OFFSHORE SERVICES, INC.,
Petitioners,

v.

AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AND ALAN S. DANIEL AND WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to The Appellate Court of Illinois, First District

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REPLY BRIEF FOR THE PETITIONERS

In giving final approval to a settlement in this high-profile case, which involves a nationwide class of 1.5 million plaintiffs, the Illinois courts held that Illinois law could constitutionally apply to the entire class without individually analyzing Illinois' connection to the claims of each class member. Plaintiffs-Respondents do not address most of the ways—described in the petition—in which the ruling below directly contravenes *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The defense of the ruling that Respondents do offer, moreover, is inconsistent with *Shutts* and otherwise mistaken. There is no way to reconcile the decision below with *Shutts*, and summary reversal on this significant issue is therefore warranted.

In addition, while Respondents sound the predictable theme that this case merely involves the application of settled law to particular facts, that argument rings hollow. Respondents do not deny that other courts have reached conflicting decisions on strikingly similar facts. Nor do they seriously dispute the importance of the issues raised here, or that this petition offers the Court a rare chance to address these recurring issues. Unless *Shutts* is meant to be an anomaly in this Court's jurisprudence, the Illinois court's judgment should be reversed. Proper respect for the due process rights of litigants, and for core principles of federalism, call for either plenary review or summary reversal.

I. Respondents Do Not Address Most Of The Conflicts Between *Shutts* And The Decision Below.

A court cannot constitutionally apply a single State's law to a nationwide class action unless that State has "a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests," such that "the choice of [its] law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-822 (internal quotation marks omitted). The petition explained that the courts below violated this rule, employing a choice of law analysis that is constitutionally deficient for many of the same reasons identified in *Shutts*. Pet. 13-17. Respondents do not address most of these deficiencies.

A. The *Shutts* rule guards the important constitutional value of due process by ensuring that the application of a given State's law is consistent with "the expectation of the parties." 472 U.S. at 822.[1] Respondents do not dispute that the Illinois Appellate Court failed even to consider this critical factor.

As the petition notes (at 14-15), there is no evidence that when the non-Illinois class members entered into insurance brokerage transactions with Aon entities incorporated in their own States, they had any idea that Illinois law would govern the transactions. In particular, they could not have expected that Illinois law would determine (a) the fidu-

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[1] *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring in the judgment) ("This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.").

ciary duties arising from these non-Illinois transactions, (b) the claim that the local Aon entities breached those duties by failing to disclose information material to the transactions, and (c) the remedies available for those breaches. Yet the Illinois Appellate Court agreed that Illinois law controlled all of these questions without even considering the parties' expectations.[2] Indeed, the main conduct by Aon that the Illinois courts focused upon—the alleged hatching of a secret kickback scheme in Illinois—could have had no part in class members' expectations because they did not know about it.

Respondents entirely fail to explain how all class members could reasonably have expected that Illinois law would govern. For this reason alone, *Shutts* demands reversal.

B. *Shutts* also rejected the "bootstrap" argument that the procedural requirements of class actions can support the application of forum law. 472 U.S. at 821. It reasoned that these procedures do not alter the constitutional limitations on choice of law, which require a connection between the forum State and the transactions of each class member. *Ibid.* The petition pointed out several bootstrap arguments in the decisions below, which sought to justify the application of Illinois law based upon: (a) the class nature of the suit and Petitioners' right to opt out, (b) the lead plaintiffs' choice of an Illinois remedy, and (c) an Illinois choice-of-law analysis that did not consider the claims of each class member. Pet. 14-16. Respondents do not dispute the bootstrapping nature of

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[2] Moreover, the trial court only considered the expectations of the named plaintiffs, who—unlike most class members—dealt directly with Aon entities in Illinois. Pet. 13; Pet. App. 95a.

these arguments, which are discussed further in Part II below.

C. Finally, *Shutts* held that a court addressing a constitutional choice of law challenge must "first determine whether [Illinois] law conflicts in any material way with any other law which could apply." 472 U.S. at 816. Respondents do not dispute that the lower courts failed to resolve that question here, or that they would have found material conflicts had they done so. *See* Pet. 8, 17 n.1. Instead, the Illinois Appellate Court agreed with "the trial court's decision not to perform a state-by-state law analysis." Pet. App. 23a. This refusal to consider *Shutts*' first question may explain why the Illinois Appellate Court never explicitly addressed its second question (discussed below): whether Illinois has significant contacts with each class member's claims. 472 U.S. at 818-19.

Respondents appear to misunderstand this point, asserting that it does not matter "whether [Illinois'] contacts are looked at *ex ante* or *ex post* a multi-state survey," and that such a survey "has nothing to do with the constitutional sufficiency of a state's contacts." Opp. 18, 26. Petitioners agree that a state-by-state survey or balancing of significant contacts is not required to answer *Shutts*' second question, but a state-by-state analysis of allegedly conflicting laws *is* required to answer *Shutts*' first question. Moreover, to answer *Shutts*' second question, a member-by-member analysis of the sufficiency of a State's contacts is required. *See* Part II.A., *infra*. Because the courts below did not conduct the analysis required to answer either question, *Shutts* compels reversal.

II. Respondents' Efforts To Defend The Decision Below Are Misguided.

Not only do Respondents ignore many of the ways in which the decision below is contrary to *Shutts*, the attempts they make to rehabilitate the decision are themselves contrary to *Shutts* and otherwise incorrect. Respondents' arguments provide no basis for denying the petition.

A. *Shutts*' second question requires an individualized analysis of whether Illinois has significant contacts with the claims of *each class member*. 472 U.S. at 821-822. The petition explained that neither court conducted that individualized analysis below. Pet. 13-14. Respondents barely address this point; they simply assert that the Illinois Appellate Court (but not the trial court) did the analysis. Opp. 15, 17, 22.

Yet there is no credible way to argue that the Illinois Appellate Court conducted the requisite analysis on a member-by-member basis. For example, Petitioner HCA showed that it is a Tennessee-based corporation that dealt with a Tennessee-based Aon subsidiary that breached its fiduciary duty by failing to disclose kickbacks it received from their Tennessee transactions. R3835, 3871-3878. Indeed, Plaintiffs-Respondents' own complaint made clear that the breaches of fiduciary duty at issue were the failures of each local Aon entity to *disclose* its additional commission (*i.e.*, kickback) as part of each transaction with a local plaintiff. R13811. The complaint did not allege that any Aon entities breached fiduciary duties by receiving or scheming to obtain additional commissions in Illinois.

A proper *Shutts* analysis would thus have examined whether Illinois had a "significant contact" with HCA's Tennessee-based claim before applying Illinois law to that claim—or to the claim of any other non-Illinois class member. 472 U.S. at 821-822. The Illinois Appellate Court indisputably failed to conduct that analysis.

Rather, the Appellate Court focused solely on the actions of the Illinois-based Aon defendants and the Illinois remedy sought by the two lead plaintiffs; it never discussed the claims of any other class member. Pet. App. 19a-20a. Indeed, even when the court acknowledged that many class members entered into contracts in other States, it attempted to sidestep that fact by reiterating that the named Illinois *defendants* hatched the kickback scheme in Illinois—even though that scheme was not the basis of the class members' claims as discussed above. Pet. App. 20a. There is, in sum, no basis for arguing that the Illinois Appellate Court conducted the member-by-member analysis required by this Court.[3] Summary reversal is therefore warranted.

B. Respondents' primary defense of the decision below is to highlight the "unique" theory of recovery pleaded by the lead plaintiffs: a constructive trust theory. Opp. 3, 6-7, 25, 28. Yet Respondents' and the Illinois courts' heavy reliance on an Illinois remedy to justify the general application of Illinois law to a nationwide class is misguided and directly offends this Court's analysis in *Shutts*.

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[3] Furthermore, there is no dispute that the trial court failed to engage in an individualized, member-by-member analysis (Pet. 13), and the Illinois Appellate Court simply affirmed and reiterated the trial court's flawed analysis. Pet. App. 19a-20a.

For one thing, this focus skews the *Shutts* analysis. The question here is whether Illinois substantive law can constitutionally be applied to all class members' claims. By relying on the "unique" Illinois damages remedy, the courts used Illinois law to hold that Illinois law can be applied to this nationwide class under *Shutts*. Pet. App. 19a-20a, 91a, 115a. Such bootstrapping wrongly sidesteps *Shutts* and the constitutional values it protects, and it allows creative pleading to render *Shutts* meaningless in virtually any case. The Illinois damages remedy sought by lead plaintiffs simply cannot have any bearing on the antecedent question whether Illinois law can be applied class-wide.

The focus on this remedy is also contrary to *Shutts* in another important respect. *Shutts* demands examination of whether a State has significant contacts with the "claims" of each class member. 472 U.S. at 821-822. Yet Respondents and the Illinois courts improperly elevate the importance of a *remedy* sought by the lead plaintiffs and ignore the underlying *claims* alleged in this case. *See Fujisawa Pharm. Co. v. Kapoor*, 16 F. Supp. 2d 941, 952 (N.D. Ill. 1998) (constructive trust is equitable remedy, not separate cause of action). Whatever remedy is sought by the lead plaintiffs, it cannot be disputed that the claims for breach of fiduciary duty focus on failures to disclose kickbacks by Aon entities throughout the country, as described above. The Illinois courts violated *Shutts* by disregarding these claims and basing their analysis on an element of the damages sought.

C. Respondents and the Illinois courts also contend repeatedly that the fruits of Aon's misconduct were received in Illinois, supporting the application of Illinois law. Opp. 3, 8-9, 22-25, 28; Pet. App. 19a-

21a, 91a, 115a. As the petition explained (at 12, 14), this argument is nothing more than the "common fund" notion rejected in *Shutts*. 472 U.S. at 819-20. Apart from an unexplained reference to "an Illinois based res" (at 28), Respondents make no attempt to distinguish *Shutts*. That is unsurprising, as there is no evidence of a specific, identifiable, non-commingled res in Illinois that could support the application of Illinois law. *Shutts*, 472 U.S. at 820.

Even apart from *Shutts*, Respondents are wrong to focus on the receipt of funds in Illinois. That is merely a ministerial fact that occurred after the claims in this case arose. As Respondents themselves pleaded (R13805) and concede here (Opp. 8-9), Aon entities in 50 different States received kickbacks without disclosing them to their fiduciaries in those States, and those entities later transferred the kickbacks to Illinois as a matter of internal corporate affairs. If the ultimate location of ill-gotten gains were a constitutionally significant contact for choice-of-law purposes, then any defendant would be subject to nationwide class certification—and application of a single State's laws—so long as it was headquartered in that State. That cannot be the law.

D. Finally, throughout their brief, Respondents repeat that this was an "opt-out" settlement class, and that Petitioners could have opted out. Opp. i, 15, 18, 19, 25. Respondents even suggest that this feature cures any constitutional infirmity in the decision below. Opp. 18.

As the petition explained (at 14), however, *Shutts* held that the presence of an opt-out feature is no substitute for the individualized choice of law analysis that the Constitution requires. 472 U.S. at 820. If the law were otherwise, *Shutts* would be a

dead letter because the analysis it mandated could simply be ignored whenever a class action includes an opt-out provision. Respondents' repeated focus on the opt-out provision thus cannot affect the analysis.

* * *

For these reasons, Respondents' attempts to defend the Illinois Appellate Court's decision are mistaken. There is no basis on which to reconcile the ruling below with *Shutts*. If *Shutts* is to have any meaningful effect going forward, this Court should reverse.

III. Respondents Do Not Deny The Lower Court Conflicts And Do Not Seriously Contest The Importance Of The Issues Or The Appropriateness Of This Vehicle.

Even if the decision below were not plainly contrary to *Shutts*, courts addressing similar facts have interpreted *Shutts* to require a much more individualized analysis of a State's contacts with class members' claims than the Illinois courts conducted here. Respondents do not dispute this conflict. Moreover, they do not seriously contest that it is important to enforce the constitutional limitations on choice of law, or that this petition offers a rare vehicle for addressing the recurring issue whether those limitations are being respected. This Court's review is warranted for these reasons as well.

A. Respondents do not deny—or even address—the two splits of authority that the petition explains are implicated by the decision below. Pet. 18-26. In particular, two courts have squarely held on virtually indistinguishable facts that a constitutional analysis like the one conducted by the Illinois courts was insufficient under *Shutts*. Pet. 19-22.

First, in *In re St. Jude Medical, Inc.*, the district court had certified a nationwide consumer class under Minnesota law because (1) the defendant was headquartered in Minnesota, and (2) much of the conduct relevant to the claims occurred in or emanated from Minnesota, where the defective product was produced. 425 F.3d 1116, 1119 (8th Cir. 2005). The Eighth Circuit reversed, holding that "the [district] court did not analyze the contacts between Minnesota and each plaintiff class member's claims"—an inquiry necessary for the "protection of out-of-state parties' constitutional rights." *Id.* at 1120. The court remanded for the "individualized choice-of-law analysis" required by *Shutts*, observing that there was no indication out-of-state parties had any idea that Minnesota law could control potential claims when they received the product. *Id.* at 1120-1121.

Second, in *Macomber v. Travelers Property & Casualty Corp.*, Travelers allegedly received undisclosed rebates in creating structured settlements for the plaintiff class. 894 A.2d 240, 246 (Conn. 2006). The trial court ruled that Connecticut law applied because Travelers' home office was in Connecticut and the challenged company policies were set there. *Id.* at 257-258. The Connecticut Supreme Court reversed. Relying on a Third Circuit case discussing *Shutts*, it held that the trial court failed to "apply an individualized choice of law analysis to each plaintiff's claims." *Id.* at 256. It reasoned that such an analysis was required because—as here—"the nationally dispersed potential class members entered their structured settlements in different jurisdictions," and representations "necessarily were made to them by . . . agents of the defendants in those various jurisdictions." *Id.* at 257.

In this case, the Illinois Appellate Court affirmed the trial court's application of Illinois law to a nationwide class because the kickback scheme was primarily devised and orchestrated from Aon's Illinois headquarters. Pet. App. 19a-20a. Respondents do not dispute that the trial court's decision would be reversed by an appellate court that followed either case discussed above. The Court should at minimum grant certiorari to resolve this conflict, as well as the second conflict discussed in the petition (at 24-26).

B. The issues here are important: the petition shows that if courts in even a few states are allowed to continue applying their law to nationwide class actions without conducting a proper *Shutts* analysis, they will disproportionately harm the constitutional policies of due process and federalism underlying *Shutts* and will create economic inefficiencies. Pet. 26-30. The U.S. Chamber of Commerce made similar points in urging this Court to review an interlocutory Oklahoma Supreme Court decision that conflicted with *Shutts*. *See* Br. of Chamber of Commerce of the U.S. and Alliance of Auto. Mfrs. as Amici Curiae in Support of Pet'r, *DaimlerChrysler Corp. v. Ysbrand*, 542 U.S. 937 (2004) (No. 03-1342), 2004 WL 1174634.

Respondents have no serious answer to these importance arguments. Contrary to their assertion (at 27), Petitioners do not believe that all "nationwide state court class actions are bad," just as this Court did not reverse the application of Kansas law to the *Shutts* class because it thought such actions were "bad." Instead, *Shutts* recognized that applying a single State's law to a nationwide class can violate important constitutional values, and this Court

should grant certiorari here to ensure that those values remain protected.

C. Finally, whether lower courts are respecting *Shutts*' constitutional limitations on choice of law is a recurring and important question, as shown by the conflicting decisions and certiorari petitions that Petitioners have cited. Pet. 18-26, 31 n.4. Unlike past petitions, Respondents do not dispute that there are no obstacles to this Court's review of that question here. Pet. 30-33. Unless *Shutts* is meant to be written off as an anomaly of constitutional jurisprudence, therefore, the Court should grant certiorari and resolve the question.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted and the case set for full briefing and argument. In the alternative, the petition should be granted and the judgment below summarily reversed.

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SEPTEMBER 2009